HEALTH REVIEW COMMISSIO

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The following case was directed for review during the month of June:

Secretary of Labor, (MSHA) v. Bradford Coal Company, Docket No. PENN 82
(Judge Fauver, May 23, 1985)

Review was denied in the following cases during the month of June:

Secretary of Labor, (MSHA) v. Oliver Coal Company, Docket No. VA 84-40.
(Judge Broderick, May 7, 1985)

Secretary of Labor on behalf of George Logan v. Bright Coal Company &
Jack Collins, Docket No. KENT 81-162-D. (Judge Moore, May 7, 1985)

COMMISSION DECISIONS

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 82-91
v.	:	
BRADFORD COAL COMPANY, INC.	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

Pursuant to section 113(d)(2)(B) of the Mine Act, 30 U.S.C. § 82 the administrative law judge's order of dismissal issued May 23, 1985 directed for review. The ground for review is that the judge's dismi this civil penalty proceeding on procedural grounds, rather than rend decision on the merits, is contrary to Commission policy. Id.

The hearing in this matter was held before the administrative la June 15, 1982. The hearing transcript was filed on June 30, 1982. O 1985, the judge issued to the Secretary of Labor an order to show cau proceeding should not be dismissed in light of the Secretary's failur post-hearing brief. The Secretary's response explained that the atto originally assigned had resigned and that his file in this proceeding tently had been closed. The Secretary stated that the evidence intro the hearing supported a finding of violation, that due to the passage would waive his right to file a brief and that the proceeding should on the merits rather than dismissed. The administrative law judge th dismissed the proceeding for want of prosecution.

We vacate the judge's order and remand for further proceedings. Coal Company is alleged to have violated the Mine Act by failing to c a mandatory safety standard. The case has been fully tried. The Sec response to the judge's show cause order explains the reason for his to file a brief. It is not uncommon for parties appearing before the in appropriate circumstances, to waive the filing of briefs and submi

issued by the judge until almost three years after the hearing was

Accordingly, the judge's order of dismissal is vacated and th
remanded for further proceedings including providing the operator
for argument and issuance of a decision on the merits.

Richard V. Backley, Acting Chai

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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Administrative Law Judge William Fauver
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ADMINISTRATION (MSHA)

v.

UNITED STATES STEEL MINING COMPANY, INC.

Docket No. PENN 82-29

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Comm

DECISION

BY THE COMMISSION:

This civil penalty case arising under the Federal Mine S Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), presents of whether United States Steel Mining Company, Inc. ("U.S. St violated 30 C.F.R. § 75.1003, a mandatory safety standard dea the guarding of trolley wires. 1/ A Commission administrativ concluded that U.S. Steel violated the standard and assessed

1/ 30 C.F.R. § 75.1003 repeats the statutory standard at se 310(d) of the Mine Act, 30 U.S.C. § 870(d), and provides in p

> Trolley wires, trolley feeder wires, and bare signal wires shall be insulated adequately where th pass through doors and stoppings, and where they cr other power wires and cables. Trolley wires and tr feeder wires shall be guarded adequately:
>
> (a) At all points where men are required to wo
>
> ly under the wires;
>
> es of all doors and stoppings;
>
> stations.
>
> authorized representatives sha ions where trolley wires and tr e adequately protected to preve n, or shall require the use of prevent such contact. Temporar ided where trackmen and other imity to trolley wires and trol

...y U.S. Steel's assistant mine foreman, John Pacsko, rode the mantrip to ...he 8 Flat 56 Room section of the mine. Inspector Brown observed the ...antrip (also referred to as a "trolley" or "portal bus") stop to discharg ...iners at a location which he believed to be approximately 100 feet ...eyond a designated mantrip station, which placed the mantrip under an ...nergized and unguarded 550-volt trolley wire. 3/

The unguarded trolley wire at this location was approximately six ...nd a half feet from the mine floor and directly over the mantrip operator ...ead. After the mantrip stopped, the inspector observed the mantrip ...perator stand up in the bus, remove the pole from the overhead wire and ...ook the pole to the end of the mantrip; this procedure is commonly ...eferred to as "dogging" the pole. The inspector believed that while ...ogging the pole the operator was in danger of contacting the energized ...nguarded trolley wire. Based upon his observations, the inspector ...ited U.S. Steel for a violation of section 75.1003 in that "there was ...o guarding provided at the mantrip station in the 8 Flat 56 Room section.

At the hearing, Assistant Mine Foreman Pacsko testified initially ...hat the mantrip "didn't go beyond the portal bus station [mantrip ...tation]. It was the end of the wire." Tr. 91. In a follow-up question ...rom U.S. Steel's counsel, however, Mr. Pacsko testified that the mantrip ...ay have gone beyond the guarded area by "a foot or two, the length of ...he portal bus, but I don't think the operator himself went beyond the ...nguarded portion." Tr. 92. On cross-examination, Mr. Pacsko testified ...hat there was guarding "[w]ithin a short distance after where he [the ...antrip operator] parked the portal bus, the portal bus station that we ...lways parked." Tr. 94-95. Mr. Pacsko further stated on cross-examinatio ...hat the location where the citation was issued was the place where they ...always" parked and left the mantrip until the end of the shift. Tr. ...5.

/ The hearing in this case before the administrative law judge also ...nvolved citations for alleged violations of other safety standards. ...owever, we limited review to the issue of whether a violation of 30 ...F.R. § 75.1003 occurred.

/ Guarding of trolley wires at the subject mine typically consists of ...ix-inch wide wooden boards placed approximately eight inches apart on ...ither side of the trolley wire.

had to stand to dog the pole, and the wire was head high." Id.

The primary purpose of the guarding requirement in section 75.1003 is to prevent miners from contacting bare trolley wires. As noted above, this standard repeats section 310(d) of the Mine Act, 30 U.S.C. § 870(d), which, in turn, was carried over unchanged from section 310(d) of the 1969 Coal Act, 30 U.S.C. § 801 et seq. (1976)(amended 1977). The legislative history of the 1969 Coal Act relevant to section 75.1003 reveals a strong Congressional concern with the hazards associated with bare trolley wires:

> This section requires that trolley wires and trolley feeder wires be insulated and guarded adequately at doors, stoppings, at mantrip stations, and at all points where men are required to work or pass regularly.... Also, this section would require temporary guards where trackmen or other persons work in proximity to trolley wires and trolley feeder wires. The Secretary or the inspector may designate other lengths of trolley wires or trolley feeder wires that shall be protected.
>
> ... The guarding of trolley wires and feeder wires at doors, stoppings, and where men work or pass regularly is to prevent shock hazards.
>
> Because of the extreme hazards created by bare trolley wires and trolley feeder wires, the committee intends that the Secretary will make broad use of the authority to designate additional lengths of trolley wires and trolley feeder wires that shall be protected.

S. Rep. No. 411, 91st Cong., 1st Sess. 77 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part 1 Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 203 (1975).

stopped at a point along the track 100 feet from the designated mantrip station and that miners disembarked from the mantrip and proceeded to their working places. The inspector also testified that the trolley bu operator "rode right to the spot." Tr. 80. Moreover, according to U.S Steel's witness, Mr. Pacsko, the place where the mantrip stopped was no a random or one-time-only stopping place, but rather was the same locat at which the mantrip "always did" stop. Tr. 95. Thus, we hold that a mantrip station can be established through routine or regular stopping practice, as well as by explicit designation. Such a construction of the standard is founded in the practicalities of daily mining operation and furthers the protective concerns of Congress cited above.

U.S. Steel argues that the effect of the judge's decision is to convert any location where a mantrip stops into a "mantrip station" requiring guarding of the trolley wire. Given the facts in this case, we need not resolve whether a random or one-time-only stop at a particular location would render that location a station within the meaning of section 75.1003. We hold only that where, as here, a location has become a stopping place for the disembarkment and embarkment of miners through regular usage, it is a "mantrip station" for purposes of the standard.

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

4/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c) have designated ourselves as a panel of three members to exercise t powers of the Commission.

Administrative Law Judge James A. Broderick
Federal Mine Safety & Health Review Commission
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AMERICA (UMWA)

v.

GREENWICH COLLIERIES,
DIVISION OF PENNSYLVANIA
MINES CORPORATION

Docket No. PENN 84-158-C

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commiss

ORDER

BY THE COMMISSION:

This compensation case arises under section 111 (30 U.S.C.
of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 8
seq. (1982). A Commission administrative law judge dismissed a
for one week's compensation under section 111 filed by the Unite
Workers of America ("UMWA") following an explosion resulting in
of a mine owned by respondent Greenwich Collieries, Division of
Mines Corporation ("Greenwich"). 6 FMSHRC 2465 (October 1984)(A
The UMWA had based its compensation claim on its assertion that
was closed, for purposes of section 111 compensation, by an imm
danger order issued pursuant to section 107 of the Mine Act, 30
§ 817, and that that order was issued because of Greenwich's vi
of mandatory standards. On November 19, 1984, the Commission g
the petition for discretionary review filed by the UMWA.

In its petition the UMWA requested, inter alia, that the p
be remanded to the administrative law judge pending release of
investigation report concerning the mine explosion being conduc
the Department of Labor's Mine Safety and Health Administration
By letter dated April 24, 1985, counsel for the UMWA provided t
with copies of withdrawal orders issued to Greenwich by MSHA on
29, 1985, pursuant to section 104(d)(1) of the Mine Act. 30 U.
814(d)(1). Counsel stated that the full MSHA accident report w
completed in May 1985, and requested that the matter be remande

107 imminent danger order did not contain allegations of a violation o mandatory safety or health standards, a precondition, in the judge's view, for entitlement to one week's compensation under section 111 of the Act. 6 FMSHRC at 2477-78. We read the judge's decision to have rejected the contention that subsequently issued section 104 orders ma serve as a basis for an award of compensation under the circumstances presented in this case. See 6 FMSHRC 2476-78. Thus, a remand for his consideration of the recently issued withdrawal orders would therefore serve no practical purpose and would result in delay. 1/

Accordingly, the UMWA's motion for a remand is denied. In view o our ruling, the UMWA may file no later than Wednesday, July 3, 1985, a supplemental brief focusing on the asserted legal effect of the recent issued section 104 withdrawal orders. Any response by Greenwich to su supplemental brief is due within 20 days after the UMWA's brief is served. 2/

Richard V. Backley, Acting Chairma

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

1/ We also have pending on review two other cases presenting very similar, or identical issues: Local Union 1889, District 17, United Mine Workers of America v. Westmoreland Coal Co., Docket No. WEVA 81-2 (involving review of judge's decision following the Commission's reman to him in its Westmoreland decision, supra); and Local Union 2274, District 28, United Mine Workers of America v. Clinchfield Coal Co., Docket No. VA 83-55-C.

2/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), w have designated ourselves as a panel of three members to exercise the powers of the Commission.

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MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of ROBERT A. RIBEL	:	
v.	:	Docket No. WEVA 84-33-D
EASTERN ASSOCIATED COAL CORP.	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

This discrimination proceeding was initiated by the Secretary of Labor, on behalf of miner Robert A. Ribel, against Eastern Associated Coal Corporation ("Eastern") under section 105(c)(2) of the Federal Mi Safety and Health Act of 1977 ("the Mine Act"). 30 U.S.C. § 815(c)(2) (1982). Following a hearing, a Commission administrative law judge he that Ribel had been unlawfully discharged by Eastern in violation of section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), and ordered that Ribel be reinstated, with back pay. 6 FMSHRC 2203 (September 198 (ALJ). In a subsequently issued order, the judge also awarded Ribel certain costs and expenses, but denied Ribel's request for an award of attorneys' fees for private counsel retained by Ribel in this section 105(c)(2) proceeding. 6 FMSHRC 2744 (December 1984)(ALJ). Thereafter we granted cross-petitions for discretionary review filed by Eastern a Ribel. Eastern sought review of the judge's decision on the merits, w Ribel primarily sought review of the judge's denial of attorneys' fees

On review, the parties have filed extensive briefs and the Commis has heard oral argument. One of the issues addressed both in the brie and at oral argument is the apparent lack of findings of fact in suppo of the judge's conclusion that the Secretary established a prima facie case. Although the judge does reach such a conclusion, he immediately turns to the examination of the validity of Eastern's affirmative defe leaving us without the necessary findings as to the elements of the prima facie case. While some of such findings may well be set forth i the entire opinion, which encompasses three dockets, the requisite findings are not set forth in the discussion of the case before us.

Finally, in view of the expedited status of this case, the jud
directed to supplement his decision on the merits within 30 days fr
the issuance of this order. In the meantime, the Commission will r
jurisdiction over this matter.

Richard V. Backley, Acting Chai

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Com

DECISION

BY THE COMMISSION:

This disciplinary proceeding arises under Commission Pr Rule 80, 29 C.F.R. § 2700.80. 1/ On November 1, 1984, a Com administrative law judge referred to the Commission circumst the judge believed warranted disciplinary proceedings. The the referral concerned the conduct of counsel for the Secre

1/ Rule 80 provides in pertinent part:

Standards of conduct; disciplinary proceedings.

(a) Standards of conduct. Individuals practicing before the Commission shall conform to the standards o ethical conduct required of practitioners in the court the United States.

(b) Grounds. Disciplinary proceedings may be in- stituted against anyone who is practicing or has pract before the Commission on grounds that he has engaged i unethical or unprofessional conduct, ... or that he ha violated any provisions of the laws and regulations governing practice before the Commission....

(c) Procedure. [A] Judge or other person having knowledge of circumstances that may warrant disciplina proceedings against an individual who is practicing or practiced before the Commission, shall forward such in mation, in writing, to the Commission for action. Whe in the discretion of the Commission, by a majority vot the members present and voting, the Commission determi that the circumstances reported to it warrant discipli proceedings, the Commission shall either hold a hearin issue a decision or refer the matter to a Judge for he and decision....

29 C.F.R. § 2700.80.

with the Secretary of Labor a complaint of discrimination against Ida Carbon Corporation ("Ida"). After investigation, the Secretary determined administratively that discrimination had not occurred and, in accordance with the relevant provisions of section 105(c)(2) of the Mine Act, declined to file a complaint on Mr. Hutchinson's behalf. 30 U.S.C. § 815(c)(2). Mr. Hutchinson then brought the underlying action against Ida pursuant to section 105(c)(3) of the Act. 30 U.S.C. § 815(c)(3). On July 10, 1984, a subpoena ad testificandum, which was issued on behalf of the complainant by the Commission administrative law judge hearing the Hutchinson case, was served upon Butch Cure, an inspector employed by the Department of Labor's Mine Safety and Health Administration ("MSHA"). The subpoena directed Inspector Cure to testify at the hearing set for July 19, 1984, in the Hutchinson case.

On July 18, 1984, the day before the scheduled hearing, counsel for the Secretary of Labor, Ralph D. York, Senior Trial Attorney, advised the judge's secretary by telephone that the Secretary would be entering a special appearance on Inspector Cure's behalf and also would be filing a motion to quash the subpoena. The judge proceeded with the scheduled hearing on July 19, 1984, but continued the case at the close of testimo and ordered the record held open for the possible receipt of depositions The Secretary's notice of special appearance and motion to quash, dated July 19, 1984, were received on July 23, 1984. These papers were signed by Mr. York on behalf of Carl W. Gerig, Jr., Associate Regional Solicito

The Secretary's motion to quash asserted that the official policy o the Department of Labor, as set forth in the Department's regulations at 29 C.F.R. Part 2, Subpart C, prohibits employees from testifying under subpoena in cases where the Department is not a party unless a waiver is granted by the appropriate Deputy Solicitor of Labor pursuant to the provisions of 29 C.F.R. § 2.22. 2/ The motion further stated that

2/ Section 2.22 provides:

> Production or disclosure prohibited unless approved by the appropriate Deputy Solicitor of Labor.
>
> In terms of instructing an employee or former employee of the manner in which to respond to a demand, the Associate Solicitor, Regional Solicitor, or Associate Regional Solicitor, whichever is applicable, shall follow the instructions of the

(footnote 2 continued)

By letter dated July 26, 1984, a representative of the Depu Solicitor of Labor for Regional Operations informed Inspector Cu he would not be permitted to testify in the Hutchinson discrimin proceeding. On August 22, 1984, the judge issued an order denyi Secretary's motion to quash and issued a new subpoena for the pu taking the deposition of Inspector Cure by September 21, 1984. for the Secretary responded by filing a motion requesting the ju reconsider the motion to quash and his order of August 22, 1984. motion stated that a certified copy of the Secretary's investiga file had been provided to counsel for the complainant and that a testimony regarding matters not addressed in the file would be i to the discrimination proceeding. The motion also asserted that complainant's purpose was to obtain the history of the operator' compliance with the Mine Act's requirements, the appropriate sou would be MSHA's official enforcement records.

The second subpoena was served on Inspector Cure on or abou September 10, 1984, and directed him to appear for a deposition September 18, 1984. On that date, counsel for Mr. Hutchinson, c for Ida, and a court reporter were present to take the depositio Inspector Cure. Inspector Cure did not appear. On September 21 the judge entered an order denying the Secretary's motion for re sideration, and ordered that the record be held open until Octob 1984, for the purpose of receiving depositions.

On October 29, 1984, counsel for the complainant filed a mo Frank A. White, the Deputy Solicitor of Labor for National Opera Carl W. Gerig, the Associate Regional Solicitor, to allow Inspec be deposed. On November 1, 1984, before the Secretary had adequ opportunity to respond to the motion to compel, the judge certif

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Footnote 2 end.

> appropriate Deputy Solicitor of Labor. No employee or former employee of the Department of Labor shall, in response to a demand of a court or other authority, produce any material contained in the files of the Department or disclose any information relating to material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of his official duties or because of his official status without approval of the appropriate Deputy Solicitor of Labor.

ne ethical conduct of government attorneys in failing to counsel com-
liance with the subpoenas the judge had issued on behalf of the complai
ne judge clearly was empowered to issue subpoenas authorized by law, an
ule on the merits of the Secretary's motions to quash. See 30 U.S.C. §
ommission Procedural Rules 54 & 58, 29 C.F.R. §§ 2700.54 & 2700.58. Ho
lawyer may, in good faith and within the framework of the law, take st
est the correctness of a judicial ruling. See ABA, Code of Professiona
esponsibility, Canon 7 & EC 7-1, 7-2, 7-19 & 7-22 (1979). Cf. ABA, Mod
ules of Professional Conduct, Rules 3.1, 3.3 & Comments (1983). 4/ In
nstance, we cannot conclude that counsel for the Secretary acted unethi

/ Mr. White is the Deputy Solicitor of Labor for National Operations
nd, as such, was not involved in the Department's decision directing
nspector Cure not to testify. Rather, pursuant to the applicable
epartmental regulations, that decision was made by the office of Ronald
. Whiting, the Deputy Solicitor of Labor for Regional Operations. See
9 C.F.R. §§ 2.20(c)(1), 2.22 & 2.23. Thus, Mr. White had no connection
ith the decision to resist the subpoenas and his name should not have
een included in the judge's referral.

/ Canon 7 states:

> A lawyer should represent a client zealously within the bounds of the law.

Ethical Consideration 7-22 provides:

> Respect for judicial rulings is essential to the proper administration of justice; however, a litigant or his lawyer may, in good faith and within the framework of the law, take steps to test the correctness of a ruling of a tribunal.

Ethical Consideration 7-25 provides in relevant part:

> Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus while a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, he is not justified in consciously violating such rules and he should be diligent in his efforts to guard against his unintentional violation of them.

compliance with the subject subpoenas, we note
taken by the Secretary based on the same regulations have be
federal courts in analogous contexts. See, e.g., Smith v. C
Co., Inc., etc., 11 BNA OSHC 1685, 1686-87 (D. Colo. 1983);
Co. v. Crowther, 572 F. Supp. 288, 290-91 (D. Mass. 1982).
tion supports the conclusion that counsel for the Secretary
good faith upon a plausible legal claim. In this regard, Mr
a special appearance in the case and filed two motions and a
randum supporting the Secretary's position. In making these
Mr. York acted on behalf of his superior, Mr. Gerig. The me
challenging the subpoenas were taken in support of the decis
Ronald G. Whiting, Deputy Solicitor of Labor for Regional Op
not to waive application of the subject regulations in this
These steps were taken within the framework of 29 C.F.R. §§
and, hence, of the law, as permitted by the Canons.

Further, the Secretary's counsel did not resist compli
subpoenas outside the appropriate legal framework establishe
Act and our procedural rules. Section 113(e) of the Mine Ac
§ 823(e), empowers the Commission and its judges to issue su
there is a refusal to obey the subpoena, that section of the

> In case of contumacy, failure, or refusal of any person to obey a subpoena or order of the Commission or an administrative law judge, respectively, to appear, to testify, or to produc documentary or physical evidence, any district court of the United States or the United States courts of any territory or possession, within the jurisdiction of which such person is found, or resides, or transacts business, shall, upon the application of the Commission, or the administrative law judge, respectively, have jurisdiction to issue to such person an order requiring such person to appear, to testify, or to produce evidence as ordered by the Commission or the administrative law judge, respectively, and any failure to obey such order of the court may be punished by the court as a contempt therec

30 U.S.C. § 823(e). Our rules of procedure mirror this sta
while adding an additional caveat. Rule 58(e) provides:

order.

29 C.F.R. § 2700.58(e). These provisions make clear that when a legal impasse is reached on the question of whether an individual must comply with a Commission subpoena, the issue becomes one for the federal courts to decide.

Accordingly, the underlying discrimination case is returned to the judge for disposition. The Secretary shall be afforded the opportunity t submit a reply, if any, to the complainant's motion to compel the deposition of Inspector Cure. In light of our decision, the judge should carefully weigh the relative positions and needs of the parties before seekin enforcement of the subpoena in court. In particular, consideration shoul be given to the fact that the Secretary has turned over to the complainan the investigative file in this matter. For the reasons set forth above, the judge's order requesting the institution of disciplinary proceedings against each of the individuals named therein was improper and must be vacated. This disciplinary proceeding is terminated. 5/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

5/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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ADMINISTRATIVE LAW JUDGE DECISIONS

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDIN
	:	Docket No. WEVA 85-15
	:	A.C. No. 46-06449-03525
v.	:	No. 1 Mine
HALF WAY, INCORPORATED, Respondent	:	

DECISION

Appearances: Patricia Larkin, Esq., Office of the Solicit U.S. Department of Labor, Arlington, Virgini for Petitioner;
William Stover, Esq., Beckley, West Virginia for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks a civil penalty for an alleged violation of Respondent's approved roof control plan, and therefore of 30 C.F.R. § 75.200. The violation was charge in a citation issued under section 104(d)(1) of the Federa Mine Safety and Health Act of 1977. Respondent denies tha the charged violation occurred, and contests the finding that the violation was significant and substantial. Pursu to notice, the case was heard in Beckley, West Virginia, on April 18, 1985. James B. Ferguson, a Federal Mine Inspector, testified on behalf of the Secretary. Donald F and Fred Ferguson testified on behalf of Respondent. Both parties have filed posthearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

Respondent's mine was a drift mine. It extracted coa by conventional mining methods and utilized a conveyor be

area in question.

Precaution No. 15 of the approved roof-control plan for the subject mine states that roof bolts shall not be used as the sole means of roof support when mining is being done within 150 feet of the outcrop. The plan requires that supplemental support shall consist of at least one row of posts on 4 foot spacing maintained up to the loading machine, limiting the roadway to 16 feet.

After examining the map, the inspector proceeded underground. The entries were being driven 20 feet wide. Room No. 9 had been driven a minimum of 150 feet and No. 8 approximately 100 feet while within 150 feet of the outcrop. No additional posts had been set. The roof had deteriorated in both rooms and mining had been discontinued. Mining was taking place in rooms 3 through 7 and they were approaching 150 feet from the outcrop. The roof consisted of sandy shale. The roof was generally firm.

The inspector issued a citation for a violation of 30 C.F.R. § 75.200. It was abated by dangering off rooms 8 and 9.

CONCLUSIONS OF LAW

The evidence clearly establishes that Respondent had performed mining within 150 feet of the outcrop as shown on the mine map. No supplemental supports had been provided The location of the outcrop can only be determined on the basis of engineering projections. It is not possible to determine it by visual inspection underground. The conditio found was proscribed by the approved roof-control plan. Therefore, a violation of 30 C.F.R. § 75.200 was established

The violation was serious. Even a stable roof is liabl to deteriorate as mining approaches the end of the coal seam That this is so was clearly shown by the deterioration of the roof in rooms 8 and 9. A serious injury or fatality wou

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. SE 84-67
v.	:	A.C. No. 01-01247-03586
	:	Mine No. 4
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION

Before: Judge Kennedy

The parties having failed to show cause why the tentative decision of May 8, 1985 should not be confirmed it is ORDERED that said decision be, and hereby is, ADOPTE and CONFIRMED as the final disposition of this matter. It is FURTHER ORDERED that the operator pay the penalty asses $100, on or before Friday, June 21, 1985, and that subject payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

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R. Stanley Morrow, Esq., Jim Walter Resources, Inc., P.O. C-79, Birmingham, AL 35283 (Certified Mail)

/eip

v.	:	Order No. 2053590; 3/18/8
	:	
SECRETARY OF LABOR,	:	No. 1 Tipple
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

Appearances: Edgar B. Everman, Little Sandy Coal Sales, Inc., Grayson, Kentucky, for Contestant; Edward H. Fitch, Esq., Office of the Solicitor U.S. Department of Labor, Arlington, Virginia for Respondent.

Before: Judge Melick

This case is before me on remand from the Federal Mine Safety and Health Review Commission by decision dated March 28, 1985. De novo hearings were thereafter held on May 21, 1985 on the Contest filed by Little Sandy Coal Sales, Inc. (Little Sandy) under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act." Little Sandy challenges the issuance by the Federal Mine Safety and Health Administration (MSHA) of a withdrawal order on March 18, 1983, pursuant to § 104(b) of the Act.[1]

---

[1]Section 104(b) of the Act reads as follows:

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited fr
entering such area

scale house, parts and lubricant storage trailer and a raw coal processing apparatus. The processing apparatus consisted of a raw coal hopper, raw coal feeder and belt, a crusher with a load-out belt and a screening unit. The plan is located on approximately 1-1/4 acres and the coal stockpile area on approximately 3/4 of an acre. The processing apparatus is about 100 feet long and is powered by a 440 vol commercial power unit and a diesel motor.

During relevant times raw coal was purchased from several local mines and was custom processed into (1) crushe coal, (2) stoker coal, and (3) fine coal or carbon. The stoker coal was further sized depending on customer demands -- one size for household use in stoker stoves and another for commercial use. 25 to 30 percent of the processed coal was prepared for local residents for household use and 70 to 75 percent for commercial users such as the local county school systems and Morehead State University. The processi plant is depicted in photographs marked as government exhibits 1 a, b, and c, and 2 a, b, and c.

Included within the definition of the term "mine" unde section 3(h)(1) of the Act, are facilities used in the "work of preparing coal."[2] The phrase "work of preparing coal" is defined in section 3(i) of the Act as: "[t]he breaking, crushing, sizing, cleaning, washing, drying, mixing, storin and loading of bituminous coal, lignite or anthracite and such other work of preparing such coal as is usually done b the operator of the coal mine."

This and other criteria for determining whether a coa handling operation is engaged in "work of preparing coal" were recently reviewed by the Commission in Secretary v. Mineral Coal Sales, Inc., 7 FMSHRC _____ (May 16, 1985):

---

[2]Section 3(h)(1) of the Act states, in relevant part, as follows:

> "Coal or other mine" means . . . (C) lands, . . . structures, facilities, equipment, machines, tools, or other property . . . used in . . . or to be used in . . . the work of preparing coal or

> [I]nherent in the determination of whether an operation properly is classified as "mining" is an inquiry not only into whether the operation performs one or more of the listed activities, but also into the nature of the operation performing such activities. . . .
>
> . . . [A]s used in section 3(h) and as defined in section 3(i), "work of preparing [the] coal" connotes a process, usually performed by the mine operator engaged in the extraction of the coal or by custom preparation facilities, undertaken to make coal suitable for a particular use or to meet market specifications.

4 FMSHRC at 7, 8 (emphasis in original). In Elam the Commission held that a commercial loading dock that loaded coal, in addition to other materials, was not a "mine". The Commission concluded that Elam's handling of the coal, which included storing, breaking, crushing, and loading, was done solely to facilitate its loading, business and not to meet customer's specifications or to render the coal fit for any particular use.

The Commission followed Elam in Alexander Brothers, Inc., 4 FMSHRC 541 (April 1982), a case arising under the 1969 Coal Act, 30 U.S.C. § 801 et seq. (1976) (amended 1977). We concluded that an operation that extracted materials from a waste dump and separated coal from the refuse in order to market the coal was engaged in coal preparation. Accord: Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589, 591-92 (3rd Cir. 1979) (a facility that separated coal fuel from material dredged from a river bottom by another entity was engaged in coal preparation under the Mine Act). The Commission has also emphasized that a preparation or milling facility need not have a connection with the extractor of the mineral in order to

, mixed, crushed, sized, and loaded -- all activities
ed within the statutory definition of coal preparation.
ition the nature of the Little Sandy operation was such
unlike the commercial loading dock in Elam at which
as crushed merely to facilitate loading and transporta-
n barges, all of the above listed work activities were
med to make it "suitable for a particular use or to
arket specifications." Thus, Little Sandy was a "mine"
the Act and MSHA properly asserted its inspection
ity over the facility. Secretary v. Mineral Coal Sales
supra.[3]

The evidence is also undisputed that when first cited
ch 10, 1983, for having inadequate sanitary toilet
ties, Little Sandy in fact had no such facilities.[4]
ition it is undisputed that when the inspection team
ed on March 18, 1983 to determine whether abatement had
ompleted, Edgar Everman, president of Little Sandy,
ted that not only did he not have an approved toilet
ty but that he "did not intend to put one there". Cita-
umber 2053613 issued for failing to have an approved
ry toilet under 30 C.F.R. § 71.500 was therefore valid

---

e not ignored Little Sandy's contention that its coal
sing operation is not considered to be a "mine" under
s Kentucky laws and under the Federal Surface Mining
claimation Act. However, disposition of this case is
ed solely by the separate and distinct provisions of
deral Mine Safety and Health Act of 1977. Little Sandy
so expressed concern that consideration had not been
to the fact that it is a small operator. As explained
ring the size of the mine operator and the effect any
ry penalty would have on the operator's ability to stay
iness are factors that must be considered by the Commis-
udges in assessing civil penalties for violations under
t. See section 110(i) of the Act.

HA inspector had also cited eleven other violations on
ate but for purposes of litigating the jurisdictional
discussed supra, MSHA selected this citation and the

Gary Melick
Administrative Law Jud

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rbg

ARRY L. WADDING, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. PENN 84-186-D
UNNELTON MINING COMPANY Respondent	:	MSHA Case No. PITT CD 84-1(
	:	Marion Mine

DECISION

ppearances: Samuel J. Pasquarelli, Esq., Jubelier, Pass & Intrieri, Pittsburgh, Pennsylvania, for Complainant;
R. Henry Moore, Esq., Rose, Schmidt, Dixon & Hasley, Pittsburgh, Pennsylvania, and Joseph T. Kosek, Jr., Esq., Tunnelton Mining Company, Ebensburg, Pennsylvania, for Respondent.

efore: Judge Melick

This case is before me upon the complaint of Harry adding pursuant to section 105(c)(3) of the Federal Mine afety and Health Act of 1977, 30 U.S.C. § 801 et seq., the Act," alleging that he was discharged from the Tunnelton ining Company (Tunnelton) in violation of section 105(c)(1) f the Act.[1]

---

[1] Section 105(c)(1) of the Act provides in part as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . in any coal or other mine subject to this act because such miner . . . has filed or made an complaint under or related to this act, including a complaint notifing the operator or the operator's agent, or the representative of the miner at the coal or other mine of an alleged danger or safety or health violation in a coal or

105(c)(1) of the Act.

In order for the Complainant to establish a prima fac violation of section 105(c)(1) he must prove by a preponderance of the evidence that he engaged in an activity (or activities) protected by that section and that his discharg was motivated in any part by that protected activity. Secretary ex rel. David Pasula v. Consolidation Coal Compan 2 FMSHRC 2786 (1980) rev'd on other grounds sub nom., Consolidation Coal Company v. Secretary, 663 F.2d 1211 (3rd Cir., 1981). See also Boitch v. FMSHRC, 719 F.2d 194 (6th Cir. 1983), and NLRB v. Transportation Management Corporation, 462 U.S. 393 (1983), affirming burden of proof alloca tions similar to those in the Pasula case.

In this case Mr. Wadding alleges a number of protecte activities purportedly giving rise to his discharge, namely (1) that he reported in the fireboss books in February 1983 that notations he had been making on certain dateboards in areas he was required to inspect had been erased, and that there was "garbage" in the walkways (2) that during 1983 an 1984 he complained to mine foreman John Matty and to an inspector from the Federal Mine Safety and Health Administr tion (MSHA) about his inability to safely inspect various caved-in areas without the installation of tubes, (3) that June 1983, he reported a safety violation to a Federal insp tor, (4) that in October or November 1984 he "dangered off" portion of the mine because of "bad roof", (5) that on February 24, 1984, he reported in the fireboss books that t mine needed rock dusting and that certain wooden rollers

---

[2]The duties of mine examiners under applicable state law ar set forth in 52 PA. CONS. STAT. § 701-228.

[3]At separate arbitration proceedings Selapack's discharge w reversed, Solarz' discharge was modified to a warning and Wadding's first discharge was modified to a 90-day suspensi Wadding's discharge based on the trespass charges was uphel in subsequent arbitration proceedings.

constituted complaints of "an alleged danger or safety or health violation" within the meaning of section 105(c)(1).

The second element of a prima facie case is a showing that the adverse action (discharge) was motivated in any part by the protected activity. Complainant alleges herein, as circumstantial evidence of such motivation, that Tunnelton management knew of his protected activities and that such activities elicited hostile responses toward him. See Secretary ex rel. Chacon v. Phelps Dodge Corp., 3 FMSHRC 250 (1981). rev'd on other grounds, sub nom., Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). Tunnelton acknowledges that it knew of all but two of the protected activities but denies that it was motivated in any part by those activities.[4]

In support of his case Wadding cites an incident in June 1983 after he had reported a safety violation to a Federal inspector. In response to that complaint mine foreman John Matty purportedly warned him that if he continued to talk to Federal inspectors he would be fired. At hearing Matty denied any such threats and testified that after he received notice of the citation he merely asked Wadding why he had not reported the safety problems to him as mine foreman instead of to the Federal inspector. Matty was admittedly unhappy with what Wadding had done because it made him "look like I wasn't aware of what was going on at the mines." Whichever version is accepted, it is apparent that Matty was not pleased with Waddings protected activity. The relationship was further frayed when unfair labor practice charges were filed with the National Labor Relation Board (NLRB) by Wadding and others which included allegation of retaliation for filing safety complaints. The matter was at that time apparently resolved by a settlement agreement i

---

[4]Indeed the Complainant produced no evidence to show that h complaint (about the failure of fireboss Solarz to have per formed his inspections) on March 12, 1984, to state mine inspector Monaghan and to union safety committeeman Gradwel were known to Tunnelton officials. Without such evidence there is of course no basis to find that Tunnelton was moti vated by those specific complaints. It is noted however th essentially the same complaint was also made on that date t

testified essentially that he did not remember talking to Wadding about the matter. Under the circumstances I accept the undenied allegations.

On February 24, 1984, Wadding reported in the mine examiner's books that certain wooden rollers were defective (Ex. CX-6).[5] Wadding claims that Matty told him not to make entries such as that and said that he did not have the men to repair the rollers. Wadding testified that he responded by telling Matty he should find the men to replace the rollers. A written entry also appears in the examiner's book on March 12, 1984, indicating that the rollers had still not been repaired (Ex. CX-7). Wadding's testimony is not disputed on this issue.

In addition Matty does not deny Wadding's testimony that in October or November 1983, after Wadding had dangered-off an area of the mine because of "bad roof", he said to Wadding "what the hell do you mean -- you take that danger off or I'll fire you."

While it is not specifically alleged that the entries by Wadding in the mine examiner's books concerning garbage in the walkways and erasures on dateboards in February 1983 and inadequate rock dusting on March 13, and March 14, 1984, evoked any specific hostile response it may reasonably be inferred from the evidence of specific hostile responses already noted that these protected activities were not looked upon with favor by Matty. Wadding's complaint on March 12, 1984, to Foreman Learn in which he alleged that Solarz was not doing his job of performing safety inspections may be placed in the same category.

In rebuttal to this circumstantial evidence suggesting that it was motivated by Wadding's protected activities, Tunnelton cites the unprotected circumstances which it asserts provided the sole basis for its discharge of Wadding. This evidence is also presented in the alternative as the operators affirmative defense that it would have discharged

---

[5]It was one of the legally required duties of the mine examiners to report health and safety hazards in the mine examiner's (fireboss) books after their inspections.

le for examining the same areas of the mine and worked on arate, rotating shifts -- Mr. Wadding's shift followed Mr. apack's and Mr. Solarz's shift followed Mr. Wadding's.

Before his midnight shift on March 14, 1984, Wadding uested that foreman Harold Learn have the Union Safety nittee investigate whether the slope had been properly mined by Solarz, the day shift examiner. Ben Selapack, night shift examiner, had told Wadding that he had not n any dates for Mr. Solarz in the area of the slope where ew dateboard had been installed.[6].

Foreman Learn relayed this information to Frank Scott, assistant to the mine foreman, who thereafter conducted investigation with two members of the Union Safety nittee. They examined the slope area as well as other as of the belt conveyors near the slope, including the 1 th belt. They found what they called an absence of recent consistent dates in these areas and apparently felt that three examiners had not been properly performing their s. Their findings were reported to mine foreman John ty at the end of the midnight shift on March 14 and Matty

---

though the parties agree that "dateboards" as such were not uired by state or Federal Law, the mine operator in this e had provided such "dateboards" (made from old pieces of veyor belt) in places required to be inspected by the mine miners. According to company policy the mine examiners e to sign the dateboards and "any other place also ded". Those "other places" were never specified and nough both Federal and state authorites had inspected the e there is no evidence that they required any areas, other n where dateboards were located, to be initialed. The uired information was placed on the dateboards with chalk unauthorized erasures had been a longstanding problem. pany officials admittedly had been unable to correct this blem. Indeed, acting superintendent John Matty conceded one point that because of the possibility of erasures he ld not prove that an examiner had not placed his initials date on a particular dateboard. The Federal regulatory ndard at 30 C.F.R. § 303(a) sets forth the areas to be so pected and requires the mine examiner "to place his tials and the date and time at all places he examines."

pending a full investigation. The examiners were notified the suspension later that day.

On Friday, March 16, 1984, a meeting attended by members of management, the Union, and the suspended mine examiners was held to review the matter. At that meeting each of the mine examiners identified particular locations along the belt conveyor in the 3 North area of the mine whe they indicated their dates would be found. It was decided that Matty and the Chairman of the Union Safety Committee, James Gradwell, would reexamine this area beginning at 7:00 the next morning to determine whether the dates were in fac located as identified by the mine examiners.

Matty and Gradwell thereafter inspected the 3 North belt area on March 17, and purportedly found no dates in th areas identified by the mine examiners and purportedly foun a pattern of dates and times from which they concluded that the area had not been properly examined by any of the three examiners. On Tuesday, March 20, 1984, each of the mine examiners was accordingly suspended with the intent to discharge. The discharge letters were prepared by Marino and signed by Weimer. The letter to Wadding reads as follows:

> In accordance with Article XXIV - "Discharge Procedure" of the 1981 National Bituminous Coal Wage Agreement you are hereby notified that your suspension on 3/15/84 is converted to a SUSPENSION WITH INTENT TO DISCHARGE for failure to make proper examinations as prescribed by Law and Company directives. You also failed to sign and date examinations for No. 1 North belt and No. 3 North belt, which is required as part of your daily job assignment.
>
> Failure to make proper examinations has resulted in a Federal citation being issued, but more importantly, has placed the well being of the mine and all mine employees in jeopardy.
>
> In accordance with Article XXIV, Section (b) "Procedure", you may request a meeting with Mine Management after 24 hours but within 48 hours of this notice.

proffered non-business justification for his discharge was not a pretext. While I find little substance to support Tunnelton's claim that Wadding was required by law or compa policy to initial and date specific locations other than da boards[8] I find that the credible evidence supports its claim that two of the dateboards had been notated by Waddin on March 12, 1985, with times too close to have physically permitted the required examination on that date.

It is not disputed that Wadding's examination route o March 12 would have taken him from 3 North drive dateboard the 3 North tail, from the 3 North tail to the 3 North driv and from the 3 North drive along the track to 1 North. Whi most of this trip could have been made in a vehicle, there were several derails and a set of air lock doors which required dismounting from the vehicle to throw the derail o open the doors, mounting again to pull the vehicle ahead, dismounting again to rethrow the derail and remounting the vehicle again. 600 feet of the trip would also have been b foot in a low area of the mine. All this was to be done while conducting an examination.

Wadding's notations for March 12, indicate that he wa at the 3 North Drive at 11:49 p.m. and at the #35 Dateboard

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[7]After the 24-48 hour meetings the suspensions with intent discharge were converted to discharges. Grievances were filed in each case and arbitrated separately. As noted, Selapack's discharge was reversed, Solarz's discharge was modified to a warning and Wadding's was modified to a 90-da suspension. Arbitrator Marvin Feldman found that Wadding h not performed his examinations according to law and, based part on Wadding's prior disciplinary record, warned that further "substandard activity" would result in a discharge.

[8]At hearing Tunnelton claimed in this regard that there wer four locations that Wadding had failed to initial and date but none of those locations had dateboards. The evidence does not establish that company policy required that any specific area other than dateboards be initialed and dated the mine examiners. There was, moreover, a recognized problem of unauthorized erasures and illegibility of the chalk notations made by the examiners and on one occasion

but were only rough estimates. If the times had been r
off to the nearest 5 or 10 minutes that argument might
some weight. When, however, as in this case, the times
reported down to the precise minute, Wadding's proffere
explanation does not ring true.[9] Mr. Wadding's cred-
ibility on this issue is further undermined by his over
loss of credibility in denying the trespass incident, d
cussed, infra, contrary to the testimony of three disin
terested eyewitnesses who knew Wadding.

Tunnelton's rather harsh response to the three mi
examiner's apparent deficiencies must also be considere
the context of several events that preceded the dischar
action. Shortly before the discharges there had been a
explosion at Greenwich Collieries, another mine control
the same management as Tunnelton. Federal and state in
igations were continuing at the time of the incident at
and there were allegations that improper mine examinati
had caused the explosion. In addition, a citation had
issued to Tunnelton on March 15 (by an inspector involv
the Greenwich investigation) for an inadequate mine exa
tion. Tunnelton officials were apparently also then aw
another fatal explosion that occurred in July 1983 that
also caused by improper examinations. Accordingly, Tun
officials were clearly under immediate pressure, if not
already obligated, to see that the mine examiners were
properly performing their critical duties. Finally, sh
before Wadding's discharge Tunnelton had discharged a f
for having failed to properly report a mine examinatior
is understandable under these circumstances that manage
may have felt compelled to apply similar harsh treatmer
the three mine examiners herein.

Three other factors are also persuasive indicator
the proffered non-business justification was not a pret

---

[9]While the Pennsylvania Bureau of Deep Mine Safety foun
no violations of state laws had been committed by the r
examiners it is not apparent from that determination th
Bureau considered the specific issue of the timing of
Waddings dateboard notations in relation to the impossi
of performing the examinations within the noted times
CX-12).

aminers for any protected activity. In other words there no evidence that Wadding was singled out for disparate eatment. Under all the circumstances I find that Tunnelton d indeed have a plausible non-protected business justifica-on for Wadding's discharge.

Within this framework of evidence I conclude that nnelton was indeed not motivated in any part in its first scharge action by any of Mr. Wadding's protected activities. sula, supra. While some evidence does exist that could pport an inference of a nexus between Wadding's safety mplaints and his discharge, I find that Tunnelton has firmatively defended by proving that Wadding would have en fired in any event solely on the basis of his deficient ne examination. Pasula, supra.

e Second Discharge

A second discharge action was brought against Wadding March 22, 1984 based on an alleged trespass on mine operty. The alleged trespass occurred on the March 17, dnight shift, the night before Matty and Gradwell were to inspect the mine to determine whether the examiners had en placing dates of inspection as required. Tunnelton ntends that Wadding returned to the mine that night to fill his initials and dates where he had previously failed to rform these tasks in the areas to be inspected the next day.

Foreman Learn and three union employees, Jerry Kelly, hn Lupyan, and Delvin Bartlebaugh, were outside the mine rtal during the night of March 17, when they encountered a espasser. The trespasser was not caught that night but on rch 19, officials of the local union approached Weimer on half of the three union employees indicating that the ployees could identify the trespasser. They identified m as Wadding.

The factual analysis and conclusions of arbitrator omas Hewitt in his July 1984 decision (Ex R-18) upholding dding's discharge for trespass are entitled to significant ight. Pasula, supra, Hollis v. Consolidation Coal Co., 6 SHRC 21 (1984). The same factual issue was specifically

second discharge action... circumstances, Tunnelton was not motivated by Waddi... tected activities in discharging him on this occasi... any event I find that Tunnelton has affirmatively d... since I am convinced that it would have discharged ... this non-protected reason alone. Pasula, supra.

Accordingly, this complaint of discriminatory ... is denied and this case is dismissed.

Gary Melick
Administrative Law Ju...

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R. Henry Moore, Esq., Rose, Schmidt, Dixon & Hasle... Oliver Building, Pittsburgh, PA 15222 (Certified ...

Joseph T. Kosek, Jr., Esq., Tunnelton Mining Compa... Box 367, Ebensburg, PA 15931 (Certified Mail)

rbg

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[10]Tunnelton conceded at hearing that Wadding's all... a miner's belt and hardhat could not be proven and... ingly is not considered herein as a basis for Wadd... discharge.

HARVEY, RONALD COLLINS, DONALD BELCHER, RONNY BLANKENSHIP, JIM EARLY, RONALD HARLEY, PAUL EPLIN, ROBERT D. WOODS, BARRY BROWN, JESSIE D. WHEELER, AND THURMAN GOODMAN, Complainants	:	Jane Ann No. 31 Mine
v.	:	
ALGONQUIN COAL COMPANY, CHICKASAW, INC., POWELLTON COMPANY, AND HOWARD CLINE, JR., Respondents	:	

DECISION

Appearances: Earl R. Pfeffer, Esq., United Mine Workers o
America, Washington, D.C., for Complainants;
Daniel D. Dahill, Esq., W. Logan, West Virgi
for Respondents Algonquin Coal Company,
Chickasaw, Inc., and Howard Cline, Jr.,
Charles Q. Gage, Esq., and Larry W. Blalock,
Esq., Jackson, Kelly, Holt & O'Farrell,
Charleston, West Virginia, for Respondent
Powellton Company.

Before: Judge Steffey

Pursuant to an order issued September 11, 1984, a hear
in the above-entitled proceeding was held on October 30, 19
in Logan, West Virginia, under sections 105(c)(3) and 105(d
30 U.S.C. §§ 815(c)(3) and 815(d), of the Federal Mine Safe
and Health Act of 1977.

Counsel for complainants filed their initial brief on
March 6, 1985, and counsel for respondent Powellton Company
filed a reply brief on April 9, 1985. Counsel for respondent
Algonquin Coal Company, Chickasaw, Inc., and Howard Cline,
elected not to file a brief.

(1) Did respondents Algonquin Coal Company, Chickasaw Inc., and Howard Cline, Jr., (Cline) interfere with complainants' statutory rights, in violation of section 105(c) of the Act, when Cline asked them to complain to the Mine Safety and Health Administration (MSHA) of the U.S. Departme of Labor about the excessive number of inspections which we being conducted at the Jane Ann No. 31 Mine, considering th the request was associated with a statement that Cline coul not continue to operate the mine unless there was a reductio in the number of inspections?

(2) Did Cline discriminate against complainants in vio lation of section 105(c)(1) of the Act when he laid complai off on November 8, 1983, considering that all of the lay-of slips gave the reason for the lay-off to be "[c]an't make i to so many mine inspections."

(3) Can the Powellton Company, as owner of the Jane A No. 31 Mine, be held liable for Cline's alleged discriminat conduct?

Findings of Fact

The preponderance of the evidence and my evaluation of witnesses' demeanor at the hearing support the following fi of fact.

1. The Jane Ann No. 31 Mine involved in this proceed owned by the Powellton Company which, in turn, is owned by foreign corporation with offices in Lugano, Switzerland. Powellton's executive vice president, Burl Ellison Holbrook testified on Powellton's behalf (Tr. 231-232). He stated t Powellton was actively engaged in producing coal until Octo 1981. Powellton ceased to produce coal because it had lost $2,500,000 in trying to operate its own mines. In October Powellton began to employ independent contractors to produc coal from Powellton's mines (Tr. 233-234).

2. Before Cline contracted to produce coal from the Ann No. 31 Mine, three other companies had tried unsuccessf to operate the mine. James Griffin, one of the complainant this proceeding, testified that he had worked for all three the unsuccessful operators. The first company, Ball Coal

conomic reasons in May 1983 (Tr. 52).

3. After three companies in a row had found it uneco
o operate the No. 31 Mine, Powellton's top management gave
olbrook instructions to close the mine, but Cline had worke
or Powellton as a mine foreman when Powellton itself was a
oal producer (Tr. 176), and Holbrook urged his superior to
ermit Cline to reopen the mine under the name of Algonquin
oal Company because Cline had a good record when he was
ne of Powellton's foremen (Tr. 239). Cline had some appre-
ension about trying to operate the No. 31 Mine in light of
he fact that three previous operators had found it uneconom
o do so. Cline, however, believed that he had an advantage
ver the other operators because he had supervised the panel
f miners who had to be employed at the mine under the UMWA
age Agreement and Cline believed that his previous successf
elationship with the miners, who are the complainants in th
roceeding, would enable him to produce a larger volume of
oal than the other unsuccessful operators had been able to
roduce and that he would thereby succeed where the other
perators had failed (Tr. 214).

4. Powellton is a signatory of the National Bituminou
oal Wage Agreement of 1981 (Exh. A) and requires all of the
ompanies which operate its mines to employ miners from UMWA
ocal No. 8217. Since the same panel of miners must be used
y any of the operators who try to mine coal from the No. 31
ine, there was a change in top management when Ball, Miracl
nd Rite Way, in turn, unsuccessfully tried to operate the
ine, but the employees for all three operators were the sam
iners who constitute the complainants in this proceeding (T
44). Since Powellton and all of its independent contractor
re bound by the terms of the Wage Agreement, Powellton
equires its operators to provide it with the number of hour
orked by each miner so that Powellton can pay the proper
mounts into UMWA's welfare funds. Powellton makes the pay-
ents and subtracts the payments from the price which it pay
o its operators for clean coal. Powellton prefers to make
he payments and then deduct the payments from the price it
ays its operators for clean coal because UMWA charges 18 pe
ent interest if the payments are late (Tr. 252). Powellton
lso requires all of its operators to maintain regular healt
nd accident insurance for all their miners (Tr. 237).
owellton, however, stated that it does not interview applic

An amount of $1.50 per ton for rental of equipment was deducte from the price paid to the operators for clean coal delivered to its preparation plant. Cline, however, was required to pay for all spare parts and supplies, such as roof bolts, rock dust, and timbers. The operators had to pay for their own engineering, accounting, and respirable-dust services (Tr. 255-256). Cline additionally had to pay the cost of transporting coal from the No. 31 Mine to Powellton's preparation plant (Tr. 258). Cline bought liability insurance from Nationwide (Tr. 217) and stated that he paid a person named Larry Heatherman for taking respirable-dust samples (Tr. 218) As hereinafter explained in finding No. 16, Cline sold his interest in the No. 31 Mine to Chickasaw, Inc. That company also found it uneconomic to produce coal from the No. 31 Mine and ceased its operations while it still owed the complainant about 1 month's wages. All of the miners asked Powellton to pay the wages owed to them by Chickasaw. Powellton granted the request and paid the full amount owed by Chickasaw. Powellton is still carrying those payments on its books as receivables from Chickasaw. The reason Powellton paid complainants the wages owed by Chickasaw is that Powellton interprets Farley v. Zapata Coal Corp., 281 S.E.2d 238 (1981) to mean that the employees of an independent contractor, under Chapter 21, Article 5, Section 4, of the West Virginia Code, may obtain payment from the general contractor of any wages not paid by the independent contractor, including liquidated damages (Tr. 247-249). Powellton asserts, however, that its direct payment of wages to complainants for work performed for Chickasaw in the above-described circumstances should not be interpreted as an indication that it exercises any control over its independent contractors in the way they utilize their employees (Tr. 247).

6. Counsel for complainants presented five witnesses in support of their claim that Cline had discriminated against them in violation of section 105(c)(1) by asking them to complain to MSHA about the excessive number of inspections which were being conducted at the No. 31 Mine. Four of the witnesses were miners who had worked at the No. 31 Mine and the fifth witness was a UMWA international health and safety

unemployed at the time of the hearing, but who had worked for Cline as a ram-car operator from the time Cline began producing coal from the No. 31 Mine under the name of Algonquin Coal Company in June 1983 until November 8, 198 when Cline ceased to operate the mine (Tr. 21-22; Exh. 9) Griffin was on the mine safety committee and generally accompanied the inspectors when they made their examinati of the mine (Tr. 22; 70; 207). Griffin stated that an MS inspector by the name of John Franco made an inspection a the last of October and the first of November during whic he wrote about 25 citations (Tr. 23; Exh. 8). The miners came out of the mine on one occasion because of their concern that Cline had left them in the mine with no mean of transportation out of the mine (Tr. 23). After the miners came out of the mine, Griffin stated that Cline to them to take the remainder of the day off with pay and go to the MSHA office and complain about Franco's writing an excessive number of citations. Griffin testified that he heard Cline say, "[i]f we can't get rid of this man, can' get rid of these inspectors, I'm going to have to shut do I can't stand it" (Tr. 25). When it was subsequently pointed out to Griffin that his statement did not sound a if Cline had threatened him with discharge if he failed t complain about Franco's activities, he changed Cline's st ment by testifying that Cline said "[i]f we can't get rid this guy, we're going to have to shut down. You all have got to help us get rid of this fellow" (Tr. 90).

7. Griffin based his allegation of discrimination the claim that Cline laid them off on November 8, 1983, t called nine of them back for 1 day's work on November 15, 1983, and called all of them back to work on December 5, 1983, at which time Cline introduced them to four men who operated the No. 31 Mine under the name of Chickasaw, Inc up to May 2, 1984, when they were again laid off (Tr. 29) Although Griffin testified that Cline introduced them to four men named Aaron Bolan, Charles Halsey, Richard McDor and Dave Dickenson who operated the mine under the name o Chickasaw, Inc., he insisted that Cline was still the act operator of the mine because he had signed job vacancy no as Chickasaw's superintendent on December 5, 1983, callin them back to work in the No. 31 Mine (Tr. 27; Exh. 1). G stated that Cline was there only on the first day the min

Charles Halsey and Dave Dickenson were the superviso
the night shift (Tr. 66-67). Griffin also stated th
was aware that Cline had tried to sell his rights to
No. 31 Mine to Homer Hopkins and Bud Smith (Tr. 46;
They were the two men who came to the mine with Clin
November 15, 1983, but they left soon after they cam
Cline did not operate the mine thereafter until he c
the miners back to work on December 5, 1983, to work
Chicksaw, Inc. (Tr. 47).

8. The second witness presented by complainan
counsel was Ronald Blankenship who was unemployed at
time of the hearing, but who had worked for Cline as
operator of a roof-bolting machine until Cline laid
on November 8, 1983, by giving him a lay-off slip th
the reason for the lay-off to be that Cline could no
it due to so many mine inspections" (Tr. 96; Exh. 9)
Blankenship said that Cline had discriminated agains
by telling them that they would either have to get r
the inspectors or they would get laid off (Tr. 95).
Blankenship believed that Cline was operating the mi
after it resumed producing coal under the name of Ch
Inc., because Cline was present at the mine on the f
and introduced them to three men named Dave Dickenso
Bolan, and Richard McDorman who said that they owned
Chickasaw, Inc. (Tr. 98). Blankenship also stated t
Cline offered him $50 to whip Inspector Franco, but
not take the offer of $50 (Tr. 96). Blankenship add
ally testified that he performed good work and that
worked double shifts "about every day" (Tr. 94). He
not think he would have been asked to work double sh
unless he had been performing good work (Tr. 95). B
ship's claim that he worked double shifts about ever
is not supported by Exhibit 7 which shows that he wo
130 hours in July, 153 in August, 185.5 in September
161 in October 1983. Each month has at least 20 sir
shifts, or 160 hours. In order for Blankenship to h
worked double shifts "about every day," he would hav
to have worked at least 250 or more hours per month.
ship conceded on cross-examination that Cline had to
that he "was going to have to shut down" if the mine
not produce more coal (Tr. 98).

began writing a lot of citations toward the end of October 1983, Eplin stated that Cline asked them to complain to MSHA about Franco's overzealous inspections (Tr. 102). Eplin called Congressman Rahall's office to complain about inspections and the person to whom he talked asked him if the violations cited by Franco existed. When Eplin replied in the affirmative, the congressman's representative stated that Franco was only doing his job. Eplin claims that he handed the telephone to Cline at that point in the conversation and left the office. Shortly afterwards, they were laid off and the lay-off slip gave as the reason "[c]an't make it due to so many mine inspections" (Tr. 103).

10. Eplin testified that coal production declined in September and October as compared with the tonnage produced in July and August, but he said that the decline in production was caused by break downs of the continuous-mining machines and ram cars (Tr. 103-104). Eplin's statement that the ram cars broke down frequently is contrary to Griffin's testimony which indicates that the ram cars were dependable and that they seldom were out of service except for the purpose of getting their batteries charged (Tr. 63) Eplin stated that they produced all the coal they could on good days when the equipment did not break down, but he agreed that Cline told them he was going to have to shut down if they did not produce more coal than they did (Tr. 107; 112).

11. The fourth witness called by complainants' counse was Robert Woods who worked for Cline as an electrician fro June to November 1983. He repaired equipment which he described as being subject to "continuous breakdowns" (Tr. 113). In his opinion, more production time was lost as a result of breakdowns with the equipment than was lost from inspections (Tr. 114), but he also stated that "[u]sually when an inspector is there, you didn't get to do very much work" (Tr. 117). Woods had worked in coal mines for 20 yea and he stated that there were more inspections at Cline's mine than at other mines where he has worked (Tr. 118). Woods said that Cline had complained about lack of producti

about a lot of inspections (Tr. 116). Woods stated that Cline did not ask him personally to complain about the large number of inspections being made at the mine, but that he was present on one occasion when Cline asked a group of the miners to complain. At that time he advised Cline not to make complaints to MSHA because it would do no good and might cause MSHA to order even more inspections than were already being conducted (Tr. 120).

12. Woods had a practice of marking on a calendar each day (1) the hours he worked, (2) the cuts of coal made by the continuous-mining machine, and (3) the breakdowns of equipment if 2 hours or more were required for repairs to be made (Tr. 118). A copy of Woods' calendar for the months of September, October, and November 1983 was introduced as Exhibit 12 (Tr. 151). Woods stated that a cut of coal amoun roughly to 40 tons and that he had compared his figures with the actual production information kept by Cline and tha his cuts of coal were close to actual production (Tr. 149). Examination of Woods' calendar shows that he either exaggera the number of times that the equipment broke down or failed to write on the calendar the times when breakdowns occurred, because his calendar shows only one breakdown of the continu mining machine for the entire month of September and that breakdown occurred on a Saturday when no coal was produced (Exh. 12). During the month of October, Woods showed one br down of the continuous-mining machine on October 4 and anoth one on October 12. Despite the breakdowns on those days, Wo indicated that five cuts or 200 tons of coal were produced o October 4 and 6 cuts or 240 tons of coal were produced on October 12. Woods shows one breakdown of the continuous-mining machine during the month of November, but the mine produced very little coal that month and was closed on November 8, 1983. One or two breakdowns of equipment each month does not support Woods' claim that constant breakdowns of equipment were responsible for the miners' failure to produce enough coal to make it profitable to operate the No. 31 Mine.

13. On the other hand, Woods' calendar is remarkably close in indicating the actual raw coal production of the mine. If one multiplies the number of cuts of coal shown on the calendar for each day's production by 40 tons, the result totals 3,820 tons of raw coal for the month of

wns of equipment. In any event, the entries in his
r do not support his claim that equipment breakdowns
imarily responsible for the No. 31 Mine's history of
l production.

The fifth and final witness presented by counsel
plainants was Richard Cooper who is employed by UMWA
nternational health and safety representative whose
ties are prevention of mine accidents and illnesses
isting miners in exercising their rights under the Act
5-136). Cooper testified that two of the complainants
proceeding (Griffin and Trent) came to his office in
r 1983 and told him that they had been discharged
they refused "to get rid of a federal inspector at
e" (Tr. 137). Cooper was convinced that they had
for filing a complaint under section 105(c) of the
suggested that they do so. They filed a complaint
me day with MSHA (Tr. 137). The complaint is signed
same 14 miners who brought the complaint involved in
oceeding (Exh. 5).

Finding Nos. 2 through 5 above provide some of the
ertaining to Cline's operation of the Jane Ann No. 31
ut Cline supplied additional facts when he testified
ort of his defense to the complainants' charge that
ated section 105(c)(1) of the Act when he allegedly
em off on November 8, 1983, for their failure to
n to MSHA about the excessive number of inspections
ere being made at the No. 31 Mine. It was not apparent
e questions asked by Cline's attorney that any effort
n made to provide Cline with a defense in terms of the
ion's discrimination decisions. Therefore, Cline's
rests on his claim that he laid the complainants off
mber 8, 1983, solely for the economic reason that he
eady lost $71,000 from trying to operate the No. 31
the time he laid the complainants off and that he
could not continue to operate at a loss (Tr. 174).
tated that his loss of $71,000 had been reduced to
by virtue of the fact that two men named Homer Hopkins
Smith offered him $50,000 for transferring his interest
No. 31 Mine to them (Tr. 167). They paid him $30,000

Witness Griffin disagreed with Cline's explanation as reason Hopkins and Smith left the mine. In his opini they refused to take over the mine because it was in condition (Tr. 27).

16. After Cline had failed to sell his interest No. 31 Mine to Hopkins and Smith, the four men previo referred to in finding No. 7 (Aaron Bolan, Richard Mc Dave Dickenson, and Charles Halsey) offered Cline $15 for his interest in the mine provided he would (1) fo new corporation, (2) obtain a new contract with Powel providing for them to operate the mine in the name of newly formed corporation, (3) introduce them to the c plainants in this proceeding who would necessarily be miners they would have to use in operating the mine, vide the necessary notification to MSHA of the change operators, and (5) transfer all the stock in the newl corporation to them (Tr. 169-172). An agreement sign December 2, 1983, by Cline, Bolan, and McDorman, prov for Cline to be paid $5,000 in cash at the time the a ment was executed and for Boland and McDorman to pay $1.75 for each ton of clean coal sold to Powellton. stated purpose of the payment of $15,000 was to purch Cline's interest in a continuous-mining machine which had obtained with his own funds for use at the No. 31 (Exh. 13). Under the agreement, if Bolan and McDorma to pay the remaining amount of $10,000, the continuou mining machine would continue to belong to Cline.

17. Cline's testimony shows that some aspects o agreement were subsequently changed. The payment of per ton was assigned to Bolan and McDorman in return their paying off some funds advanced to Cline by Powe (Tr. 171). Cline claimed that Bolan and McDorman nev pay the remaining $10,000 which they owed him and tha did not know their whereabouts but would like to find in order to collect the $10,000 which they still owe (Tr. 173). Unless the terms of the agreement describ above were changed in a way not explained by Cline, h not entitled to the remaining $10,000 because the agr

from (Tr. 193), he received full title in the continuous-mining machine when Boland and McDorman failed to pay the remaining $10,000, and Bolan and McDorman do not owe Cline anything under the terms of the agreement which is Exhibit 13 in this proceeding.

18. Cline attributed 80 percent of his inability to operate the No. 31 Mine economically to the work force he was required to use under his contract with Powellton and 20 percent to interruption in production caused by MSHA inspections (Tr. 177; 192). Cline said that MSHA inspector normally talk to all the miners for 30 minutes and then the ask for the safety committeeman to accompany them on their inspections. They may thereafter spend 2 hours in the mine office before they go underground and Cline has to allow th mine committeeman to spend that same amount of time doing nothing (Tr. 178-179). Cline said that Griffin accompanied the inspectors 95 percent of the time and that meant that Griffin's ram car was idle all the time the inspector was present at the mine (Tr. 180). Cline conceded that there were three ram cars and three ram car operators, but he sai that he did not hire the third ram-car operator purely as a replacement for persons who were absent on a given day. Cline claimed that he could use three ram cars 90 percent of the time and that production necessarily suffered when Griffin was with an inspector instead of operating his ram car (Tr. 207). Cline's statement that he was able to use three ram cars 90 percent of the time might be somewhat inconsistent with his claim that the miners did not produce much coal, if it were not for the fact that when a continuo mining machine is operating, it is efficient to have enough rams cars also operating to enable coal to be taken without delay from the continuous-mining machine. Since long hauli distances were involved, use of three ram cars reduced the intervals between round trips from the face to the dumping point (Tr. 147). Of course, the miners' testimony was inconsistent about the availability of ram cars because Eplin stated that the ram cars broke down frequently, while Griff said that the ram cars were dependable and seldom were out of service except for the purpose of getting their batterie charged (Tr. 63; 103-104).

19. Cline's statement that production of coal suffere when MSHA inspectors were at the mine is supported by the

Inspections	Inspector's Name	Clean Coal (Tons)
June 15	Hinchman	The first 3 weeks of Cline
June 15	Oliver	operations were devoted to
June 20	Hinchman	cleaning up a roof fall ar
June 22	Uhl	preparing the mine for pro
June 23	Uhl	tion; therefore, no coal w
June 28	Uhl	produced (Tr. 56).
July 11	Franco	184
July 26	Oliver	226
September 20	Oliver	65
September 21	Oliver	63
September 21	Summers	
September 22	Oliver	109
September 22	Summers	
September 23	Summers	121
October 4	Franco	154
October 7	Toler	90
October 12	Toler	121
October 13	Toler	66
October 14	Toler	253
October 20	Summers	143
October 24	Summers	103
October 26	Franco	189
October 27	Franco	2
October 28	Franco	102
November 1	Franco	62
November 2	Franco	9
November 3	Franco	30
November 4	Summers	0
		2,092

2,092 tons ÷ 20 inspection days = 104.6 tons per inspection

Exhibit 7 shows the actual number of hours for which Cline p
the 14 complainants during the months of July, August, Septe
and October. He paid them for 1,851.5 hours in July, 2,201.
hours in August, 2,640.25 hours in September, and 2,397.50 h
in October. If one divides the hours worked by 14 and then
8, the result will be the number of days on which Cline paid
miners for producing the tons of clean coal delivered at Pow
preparation plant, as indicated in Exhibit 14. The average
production is shown in the tabulation below:

Oct.: 3,023.95 tons ÷ 21.4 days = 141.3 tons average daily production.

Total for 4 months: 629.1 ÷ 4 = 157.3 tons ave daily product

The above calculations show that Cline produced a daily ave 157 tons of clean coal, but his average daily production wh inspectors were at the mine amounted to only 105 tons per d

20. The preponderance of the evidence also supports C statement that he lost in the neighborhood of $71,000 as a of operating the No. 31 Mine from July to November 8, 1983 174). The loss was reduced to $41,000, of course, by the p of $30,000 to Cline by Hopkins and Smith when those two men undertook to take over the mine on November 15, 1983, and t changed their mind after operating the mine for only 2 hour 167-168; 213; 227). There is attached to the end of this d an Appendix A in which I show by use of uncontroverted fact the record that Cline lost a total of at least $62,235 for period from July to November 1983 as a result of his unsucc operation of the No. 31 Mine. Cline made no effort whatsoe prove his losses and if counsel for complainants had not in duced Exhibit 7 containing the number of hours worked by th at the No. 31 Mine and the amounts charged by Powellton for services rendered to Cline, it would not have been possible find in the record any corroborating support for Cline's cl that he lost $71,000. While my calculations in Appendix A prove losses greater than $62,235, I am confident that his were greater than the amount shown in Appendix A because th record does not reflect for certain the salaries Cline paid his foremen or all of the fees he paid for engineering, res dust, and accounting services, or the premiums he paid for $1,000,000 of liability insurance, or the amount he paid fo coal transported to the preparation plant, among other thin

21. The statement (Tr. 29) by witness Griffin that, s as he knew, Cline had not abated any of the 24 violations c by Inspector Franco when the miners were recalled to work f

Chickasaw, is not supported by the record. Exhibit 8 in this proceeding was introduced by complainants' attorney and that exhibit shows that 17 of the alleged violations were abated by Cline by November 3, 1983, or within 1 or 2 days after they we cited. The remaining seven violations were abated by Chickasa after the inspector had granted extensions of time within whic to abate the alleged violations. The extensions stated that "The operating officials of this mine have recently changed, therefore additional time is needed." Moreover, the extension of time were served on Aaron Bolan as superintendent of Chickasaw. Consequently, the inspector knew that Cline was not acting as Chickasaw's superintendent at the time he issued extensions of time on December 15, 1983, with respect to Citation Nos. 2145371, 2273564, 2273571, and 2273570. It should also be noted that Inspector Franco issued Safeguard Notices 2145372 and 2273508 on October 27 and November 1, 1983, respectively. Therefore, Cline was cited during Franco's quarterly (or AAA) inspection for 24 actual violations and was advised that his mine would henceforth be required to comply with sections 75.1403-6(b)(3) and 75.1403-10(i). Neither of the safeguard notices was considered by the inspector to be "significant and substantial." Ten of the 24 citations were not considered to be significant and substantial (Exh. 8).

CONSIDERATION OF PARTIES' ARGUMENTS

Complainants' Procedural Contentions

Refusal of Cline's Counsel To Answer Complainants' Interrogato

Complainants' brief (pp. 20-21) notes that Cline's defens in this proceeding is that the miners were nonproductive, that he was losing money, and that Federal inspections made it unprofitable for him to stay in business. As my finding Nos. 1

1/ In Consolidation Coal Co., 6 FMSHRC 189 (1984), the Commi sion held that an inspector may properly designate a violatio cited pursuant to section 104(a) of the Act as being "signifi and substantial" as that term is used in section 104(d)(1) of the Act, that is, that the violation is of such nature that i could significantly and substantially contribute to the cause

I should not give consideration to any of Cline's testimony because his counsel failed to respond to complainants' inte atories and, for that reason, complainants were subject to element of surprise at the hearing and were deprived of an opportunity to prepare rebuttal to Cline's testimony.

I must, at the outset of my consideration of complaina arguments, reject any claim by complainants that "they were deprived of an opportunity to prepare rebuttal to Cline's testimony" (Br., p. 21). The following excerpt from the tr script shows that I did not deprive complainants of any opp tunity to present rebuttal evidence (Tr. 267):

MR. GAGE: The Powellton Company has no further witnes

JUDGE STEFFEY: Have you any rebuttal, Mr. Pfeffer?

MR. PFEFFER: No, I do not. We'll rest on the testimo

Complainants did not advise me at the hearing that the were going to "rest on the testimony" of all the witnesses except Cline and they did not file a motion after the hear requesting that they be given an opportunity to present rebuttal testimony. It is manifestly improper for them to file a brief more than 4 months after the hearing was held argue that they "were deprived of an opportunity to prepare rebuttal to Cline's testimony."

Complainants' brief (p. 22) further argues that "it wo have been proper for the ALJ to preclude the offending part from offering proof at the hearing" because of the failure Cline's counsel to answer complainants' interrogatories. T also argue that it would be appropriate for the judge to gr them relief pursuant to Rule 37 of the Federal Rules of Civ Procedure. While Rule 37 provides for imposition of variou sanctions when a party fails to reply to interrogatories, those sanctions have to be applied in light of the factual situation which exists in any given case. I gave considera to holding Cline in default in this proceeding, but compla rendered that course of action unproductive by joining Powe as a party respondent. If I had held Cline in default for failure to answer complainants' interrogatories, I would st

have had to deal with the fact that complainants have receded from their claim that Powellton, as the owner No. 31 Mine, is liable for Cline's acts as an indepen tractor who operated the No. 31 Mine.

Since Powellton's counsel have acted in an exemp fashion in this proceeding by replying to complainant rogatories and by answering all of their many motions is no way that Powellton could be defaulted. If I ha Cline, complainants would still have had to proceed a Powellton, and their burden of proof would in no way diminished if I had held Cline to be in default. Mor Powellton would have had a right to a hearing and wou had a right to call Cline as a witness in its own def Powellton had called Cline as a witness, I would have have allowed him to testify and Powellton would have right to have relied upon his testimony in exercising own defense.

An additional reason for denying complainants' r that I either default Cline or ignore his testimony, complainants inadvertently proved the validity of Cli defense by introducing as a part of their direct case materials obtained from MSHA under the Freedom of Inf Act (Tr. 120-134). I am aware of no procedural rule requires a judge to ignore evidence presented by one in support of its case if that same evidence also hap prove the other party's case, particularly if the par introducing the damaging evidence states in support o admission that it is being offered because it "can he the determination of the merits of the parties" (Tr. The point is that even if I were to ignore all of Cli testimony, as complainants request, the evidence they tained from MSHA pertaining to MSHA's investigation o complainants' allegations in this proceeding would, n theless, prove all of Cline's defenses, that is, that not produce enough coal to make it profitable to oper No. 31 Mine and that MSHA's inspections, irrespective salutary benefits they may have had, did have the eff reducing the amount of coal produced at his mine (Fin Nos. 19 and 20 above).

For the reasons given above, there is no merit w ever to complainants' arguments that I should decline

There is merit to complainants' contentions about the unresponsive way that Mr. Dahill represented Cline in this proceeding. My procedural orders in this case show that Mr. Dahill initially refused to accept certified mail until I finally had him served by a United States Marshal. Thereafter, he did sign return receipts showing that he had received orders, but, aside from the answer originally filed in this proceeding, Mr. Dahill neved did submit any subsequer pleadings showing that he had even read the orders which I mailed to him.

Mr. Dahill's failure to respond to any of my orders caused me to be somewhat surprised when he actually appeared at the hearing. The reason he gave at the hearing for failir to reply to complainants' interrogatories was that he believe the complaint in this case is "ludicrous" because it was file by men who would not work hard enough to make the mine profit able and who were paid for every minute of work they did do (Tr. 15;18). Mr. Dahill also described an emotional problem associated with the death of his mother (Tr. 18) and also explained that he was representing a client in Austria which has required him to travel extensively (Tr. 19).

The reasons given by Mr. Dahill for his inaction do not justify his failure to fulfill his obligations as an attorney As I pointed out at the hearing, we have to take all complair very seriously (Tr. 20) and he should not have let his perso opinion as to the merits of the complaint or his obligations to another client, cause him to neglect Cline's interest in this proceeding by failing to reply to complainants' interrogatories and by failing to state a position with respect to complainants' motion to add Cline as an individual respondent In the future, I hope that Mr. Dahill will decline to represe clients in our proceedings unless he is certain that he will have the time to perform all of the duties which are associat with signing his name as an attorney at the bottom of an answer or other pleading.

Complainants' Brief Misstates the Facts

The "Facts" given on pages one through five of complain brief are not supported by the preponderance of the evidence The first egregious errors are on pages 2 and 16 of complain brief where it is stated that Cline's average daily producti

(Tr. 202-205).

The only reason that complainants refer to Cline's average daily production is for the purpose of arguing that his operation of the No. 31 Mine was profitable. Cline had to pay the miners for each hour worked, but only received reimbursement for each ton of clean coal delivered to the preparation plant. Therefore, it is manifestly misleading to compute average daily production by dividing the total clean coal production by days of deliveries of coal at the plant, rather than by the number of days on which Cline paid his miners to produce that coal.

As shown in finding No. 19 above, Cline's average daily production of clean coal was 189.9 tons for July and 175.6 tons for August. Cline averaged 157 tons of clean coal for the four months of July, August, September, and October. At no time did he produce a daily average of 208.89 tons of clea coal as alleged by complainants on page 2 of their brief. Powellton's brief (p. 5) appropriately calls attention to the errors in complainants' calculation of Cline's average daily production of clean coal and also arrives at an average daily production of 157 tons of clean coal for the months of July through October. Powellton's calculations for the individual months are different from the ones I have given in finding No. 19 because Powellton did not use the actual hours the miners worked for the 4 months involved.

The second paragraph on page 2 of complainants' brief claims that Cline was pleased with the miners' work despite the fact that Cline testified that the primary reason that he could not operate the No. 31 Mine profitably was the fail of the miners to perform their jobs as they should have (Tr. 175-177; 183). Cline specifically stated that he could not consider opening another coal mine in West Virginia, but tha he might try to open one in Virginia or Kentucky. When it was pointed out to Cline that mines in Virginia and Kentucky would be subject to MSHA inspections, about which he also complained, just as they are in West Virginia, he stated, "I know, but they don't have the labor. They have non-union The men [in Virginia and Kentucky] will go out and work, put in a day's work for a day's pay" (Tr. 122).

the miners themselves were not consistent in stating which types of equipment were breaking down.

It is true, as complainants state on page 3 of their brief, that Cline complained about the large number of inspections being conducted at the No. 31 Mine, but it is also true, as shown in finding No. 19 above, that MSHA did conduct a lot of inspections at Cline's mine and it is a fact that Cline's average daily production did decline considerably on the days when the mine was being inspected. Complainants allege on page 3 of their brief that Cline did not want to spend time and resources abating violations, but it is a fact, as shown in finding No. 21 above, that Cline did abate the vast majority of the alleged violations within 1 or 2 days after they were cited and within the time given by the inspector for abatement.

Complainants allege facts on page 4 of their brief about Cline's being the owner of Chickasaw, Inc., just as if the record does not contain testimony and exhibits which show the facts to be exactly to the contrary, as I have pointed out in finding Nos. 7, 16, 17, and 21 above.

Powellton's Counterstatement of Facts

Powellton's brief (pp. 3-8) contains a relatively full statement of the facts which is slightly biased in Cline's favor, as one might expect, but which is accurate in that the counterstatement is supported by the references given t the record and which acknowledges the inconsistencies between some of Cline's statements and those of complainant

Howard Cline, Jr., Is Properly Named as a Respondent

When the complaint in this proceeding was first filed, it did not name Howard Cline, Jr., as a respondent. Thereafter, I permitted complainants to amend the complaint to name Howard Cline, Jr., as a respondent because section 105(c)(1) of the Act provides that "[n]o person shall discharge or in any manner discriminate against or cause to be

miner" and section 3(f) of the Act states that a "per
means any individual, partnership, association, corpor
firm, subsidiary of a corporation, or other organizati
Cline admittedly formed both Algonquin Coal Company ar
Chickasaw, Inc., and acted as president of both compar
when they were initially formed. Although Cline trans
all the stock in Chickasaw, Inc., to four men immediat
after that corporation was formed, he still owns the
admittedly defunct Algonquin Coal Company. Additional
he personally made all the discriminatory statements a
took all the discriminatory action which is alleged by
complainants in this proceeding.

Section 105(c)(3) provides that "[v]iolations by
person of paragraph (1) shall be subject to the provis
of sections 108 and 110(c)." In other words, if a per
is found to have violated section 105(c)(1) of the Act
is subject to the civil penalty provisions of the Act.
Section 110(a) provides that "[t]he operator of a coal
other mine * * * shall be assessed a civil penalty" fo
any violation of the Act. Section 3(d) states that "
means any owner, lessee, or other person who operates,
or supervises a coal or other mine or any independent
performing services or construction at such mine."

Since Cline was operating, leasing, and controlli
mine and was, according to Powellton, an independent c
he is clearly a "person" within the meaning of section
who may be held accountable for his actions with respe
complainants who were the miners employed by him at th
Mine.

I declined to make Cline an individual respondent
proceeding until after his counsel had signed a return
showing that he had received an order indicating that
was a motion before me to name Cline as an individual
dent. As I have previously indicated above, Cline's a
did not oppose the grant of that motion or object in a
to the naming of Cline as an individual respondent in
proceeding.

According to Cline, Algonquin has no assets and
stated that he would pay anyone $500 just to assume th
liabilities still owed by Algonquin (Tr. 196). Cline

money and could not even pay a civil penalty of $1,000 if that much were to be assessed (Tr. 228). On the other hand, Powellton's witness stated that Cline owned a supply company (Tr. 238). I have rarely found a respondent in a civil penalty case to be unable to pay civil penalties in the absence of presentation of documentary proof in the form of Federal tax returns and other evidence, such as, profit and loss statements. Therefore, I cannot find on the basis of Cline's allegations of inability to pay penalties that he is personally unable to pay civil penaltie or back pay if that should happen to be the ultimate result on appeal, of the filing of the complaint in this proceedin

Complainants' Contention that Howard Cline Violated Section 105(c)(1) by Asking Complainants To Complain to MSHA About Excessive Inspection Activity

Complainants argue in two steps that Cline violated section 105(c)(1) of the Act. Their brief (pp. 7-11) first contends that Cline violated section 105(c)(1) by interferi with the miners' right to have the No. 31 Mine inspected wh Cline asked them to complain to MSHA about the excessive number of inspections which Cline believed MSHA was making his mine. Their brief (pp. 11-15) then argues that Cline violated section 105(c)(1) by laying the miners off for 1 m because they did not comply with Cline's request that they complain to MSHA about the excessive number of inspections which Cline believed were being made at his mine. I shall consider whether merely asking miners to complain to MSHA a what is believed to be excessive inspection activity is a v lation of section 105(c)(1). 2/

2/ Section 105(c)(1) of the Act provides as follows:

> No person shall discharge or in any manner discriminat against or cause to be discharged or cause discrimina- tion against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or

Under the analytical guidelines we established in Secretary on behalf of Pasula v. Consolidation Coal Corp., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Corp. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981), a prima facie case of discrimination is established if a miner proves by a preponderance of the evidence (1) that he engaged in protected activity and (2) that some adverse action against him was motivated in any part by that protected activity. If a prima facie case is established, the operator may defend affirmatively by proving that the miner would have been subject to the adverse action in any event because of his unprotected conduct alone. The Supreme Court recently approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., ___ U.S. ___, 76 L.Ed 2d 667 (1983). See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

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fn. 2 (continued)
other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such miner, representative of miners or applicant for employment on behalf

asking the miners to give up their right to have the mine inspected on a regular basis and he was giving them a message that if they failed to stop the inspections, they would be out of a job. Complainants conclude their first argument in the following words (Br. 11):

> If the Commission does not declare that this "subtle" threat is a violation of the Act, it will be an invitation to all coal operators, especially the small subcontractors, to let their employees know that their insistence upon MSHA inspections may result in layoffs. The chilling effect of this message, particularly with respect to section 103(g) actions, could have a devastating impact on the ability of the Agency to enforce the Act. Thus, even if an operator has a legitimate business reason for shutting down operations, he may not, in any fashion, suggest to his employees that MSHA leniency and non-enforcement could preserve their jobs. In these unfortunate economic times, such threats could frequently lead to an abandonment of the principles and objectives of the Act. Consequently, the Commission should not tolerate them.

Complainants' counsel conceded at the hearing that he brought "a novel action" (Tr. 160) and his brief shows that to be the case because he does not refer to a single Commis decision in support of his claim that Cline violated sectic 105(c)(1) of the Act when he asked his employees to complai to MSHA about the excessive number of inspections which Cline believed were being made at his mine. The first requ ment of the two-pronged discriminatory test which I have quoted above from the Commission's Gravely case is that a finding must be made that miners have "engaged in protected activity." The only protected activity in which complainan claim to have engaged is their refusal to complain to MSHA about the excessive inspection activity which Cline believe was being conducted at his mine. Since section 105(c)(1) prohibits any "person" from interfering with a miner's "exercise of * * * statutory rights * * * afforded by" the

MSHA's inspection activity at the mine for the 6-month number of inspections which are guaranteed by section 103(a) Finding No. 19 above shows the dates on which MSHA inspector were present at Cline's mine. The inspectors were there for 6 days in June, 2 days in July, no days in August, 6 days in September, 10 days in October, and the first 4 days of November prior to the closing of the mine on November 8, 1983.

Exhibit 8 shows that Inspector Franco wrote a total of 24 citations and two safeguard notices on October 26, 27, and 28 and November 1, 2, and 3, 1983, during a quarterly, or "AAA," inspection. Those citations alleged that Cline had failed to: (1) provide an operative panic bar on a tractor, (2) anchor in a proper manner a railroad switch on the surface, (3) place a lifting jack on a personnel carrier (4) make the miners wear the self-rescuers which Cline had provided for them, (5) insulate a splice in a telephone wire on the surface, (6) provide a derail device at the end of the track on the surface, (7) repair a hole in the fence surrounding a transformer located on the surface, (8) show that he had the mine rescue capability required by section 49.1, (9) provide a fitting where a cable entered the frame of a welding machine on the surface, (10) guard an opening in the deck of a scoop, (11) countersign the preshift books, (12) provide an adequate check-in and -out system, (13) prov an operative brake for the roof-bolting machine, (14) correc a sloughing condition around some previously installed roof bolts, (15) hang a trailing cable where it could not be run over by mobile equipment, (16) correct a defective parking brake on a tractor, (17) maintain a guard on the conveyor belt drive in proper position, (18) keep the doors on the power center closed and in good repair, (19) provide proper amount of first-aid equipment, (20) store first-aid equipmen in proper containers, (21) remove grease and coal which had accumulated on the continuous-mining machine up to 3/4 of 1 inch in depth, (22) show on the mine map the most recent places mined, (23) show on mine map the places which Cline expected to mine in the future, and (24) mark the intake airway properly.

d Chickasaw (Exh. 8). Therefore, the allegation in lainants' brief (p. 13) that Cline resumed operating mine under the name of Chickasaw, Inc., "without ecting any of the violations which had been cited by Franco" [Emphasis in original], is not supported by bit 8 which clearly shows that Cline had abated 17 of 24 alleged violations by November 3, 1983, which was nth prior to the time when the mine was reopened under name of Chickasaw, Inc. Complainants introduced bit 8 and it is disturbing to have a brief filed re me which makes allegations which their own exhibit s to be untrue.

Examination of the above-described violations cited nspector Franco in October and November shows that they e from nonserious to moderately serious and, as indi- d in finding No. 21 above, the inspector rated 10 of alleged violations as not being significant and sub- tial. Although Inspector Franco did not inspect the on November 4, another inspector was at the mine on day. The only day when Cline's mine was not inspected een October 26 and November 4 was October 31. During e 7 working days, Cline's average daily production of n coal averaged only 56.2 tons of coal (Finding No. 19 e). It was during that period of time that Cline re- ted the complainants to complain to MSHA about the ssive inspections which he believed were occurring at mine (Tr. 102). Cline had been working in mines as ction foreman prior to the time that he opened his own and was familiar with the types of inspections which normally made by MSHA (Tr. 176; 238).

His testimony shows that he believed that Inspector co was jealous of the fact that Cline, who is a relatively g man, was operating a mine because Inspector Franco had Cline that he had tried to operate a mine before becoming nspector and had failed to be successful at it. Cline, efore, sincerely believed that Inspector Franco was assing" him by writing the 24 citations which are described

October and November and I cannot find on the basis o
record in this proceeding that Inspector Franco was h
Cline or deliberately trying to force him out of busi
but the record does show that Cline's mine was subjec
a large number of inspections during October and the
week of November and the evidence certainly shows why
believed that MSHA was deliberately harassing him by
as many inspectors to his mine as it did during the m
of October and November (Finding No. 19 above).

The discussion above of the facts in the record
that if complainants engaged in any protected activit
would have to be a refusal by them to complain about
excessive inspections which Cline believed were being
at his mine. Two of the four complainants who testif
this case, however, do not claim to have engaged in t
protected activity because Eplin stated that he had c
Congressman Rahall's office to find out "why we're ge
so many inspectors" (Tr. 102). Therefore, Eplin can
claim that he exercised his right to have the mine in
frequently because he made a call to his congressman
protest the inspections. Witness Woods stated that C
had not directly asked him to run off the inspectors,
that he had been present one day when Cline said to a
of miners "[b]oys, why don't you take the rest of the
off and go down and complain about the mine inspector
Woods testified that he told Cline "[i]t wouldn't do
good * * * if you did that, they'd just bring more up
119-120).

Woods also testified that he had worked as a min
20 years and that there were more inspections at Clin
mine than there were at other mines where he has work
(Tr. 118). Consequently, it appears that both Woods
Eplin agreed with Cline that there had been a greater
normal number of inspections at Cline's mine. While
undoubtedly correct, as complainants allege, that the
entitled to have frequent inspections of the mine mad
MSHA, there is nothing in the record to show that Cli
objected to normal MSHA inspection activity. His req
that the miners help him obtain some relief to the in
tions was made only after the frequency of the inspec
had reached what he termed to be deliberate harassmen
220).

about what he sincerely believes to be excessive inspections and harassment by MSHA inspectors. As indicated in finding No. 18 above, Cline believed that his inability to operate the mine economically was 80 percent the result of complainants' failure to put in a day's work for a day's pay (Tr. 221) and 20 percent the result of excessive inspections by MSHA. Section 105(d) of the Act gives an operator the right "to contest" the issuance of citations and orders and the proposed assessment of civil penalties. Clearly, Cline could have stated to the miners that he was going to file notices of contest to the citations issued by Inspector Franco and that if his protests did not bring about a decrease in the frequency of inspections, he was going to close the mine because he could not have production interrupted to the extent that the inspector's mine examinations were causing. Yet there would be a clear implication in such a statement that the miners would lose their jobs if MSHA continued to inspect the mine as frequently as it was being inspected in October and November 1983.

It appears to me that Cline's request of the miners to complain to MSHA about the excessive inspections was little more than understandable griping about conditions over which he had no control. Cline's attorney stated that he had personally gone to MSHA, in Cline's behalf, to complain abou the excessive inspections and that he had asked MSHA if it was that agency's intention to force Cline out of business (Tr. 10). Although MSHA's reply was in the negative, the record shows that there was no reduction in the number of inspections made at Cline's mine.

The record shows that the primary reason Cline believed he could operate the No. 31 Mine profitably, despite the fac that three previous operators had been unable to do so, was that he had previously worked with complainants in the capacity of both a union miner and as their section foreman and had what he thought was a good working relationship with them and he thought that they would "pull" for him and produce coal in sufficient quantities to make his operation profitable (Finding No. 2 above; Tr. 176; 214). In such circumstances, Cline's working relationship with complainant was on a much more informal level than would normally exist

time the mine opened
not producing enough coal to make the operation profit
(Tr. 116), but Cline testified that he simply could no
the miners to realize that he had to have increased pr
duction in order to continue operating. Cline stated
the miners just believed that if he went out of busine
someone else would take over the mine and operate it o
Powellton would resume direct operation of the mine (T
183).

In the circumstances described above, Cline belie
that he could frankly discuss his problems with the mi
Therefore, it is not surprising that he would have enl
their cooperation in an attempt to have them assist hi
obtaining a reduction in the excessive inspection acti
which even some of the complainants agreed was being
conducted. In the kind of exchange which I have obser
between miners and their supervisors, it is entirely p
that Cline may have jokingly told Blankenship that he
give him $50 to whip Inspector Franco, although Cline
that he made such a suggestion (Tr. 96; 180). I belie
Cline is too intelligent and knowledgeable to have ser
made such a suggestion and I believe that Blankenship
that Cline was kidding if the matter was ever discusse

In fact, I believe that this entire complaint aro
after the miners finally realized that no one could op
the No. 31 Mine profitably. After being out of work f
period of time, they then went to their UMWA represent
and told him that they were discharged because they re
"to get rid of a federal inspector at the mine" (Tr. 1
When Griffin testified at the hearing, however, his te
mony clearly shows that all Cline really said to them
that if they could not help him get Inspector Franco t
making so many inspections, that he was going to have
close down because he could not operate the mine econo
with the frequent inspections which Franco was conduct
(Tr. 88-90). That is entirely different from the stat
made to Cooper to the effect that Cline discharged the
because they would not get rid of an MSHA inspector.

y (Exh. C, p. 3). It is clear that Cline was stating
othing but the truth when he told his miners that if
nspector Franco's frequent inspections could not be reduced,
e would have to close down (Finding Nos. 19 and 20 above).

The extended discussion above brings me back to the
lace I started, namely, that the only protected activity
n which complainants could possibly have been engaged was
eclining to complain to MSHA about the frequency of the
nspections which were being conducted at the No. 31 Mine.
hile that is hardly the type of protected activity which
omes within the plain language of section 105(c)(1), such
s making a safety complaint, it must still be considered
o be contrary to the spirit of section 105(c)(1) for an
perator to ask his miners to complain to MSHA about the
ery kind of activity which the Act was intended to accom-
lish. A miner should not, as complainants argue, be asked
o request a curtailment in inspection activity even if
here is evidence showing that the frequency of inspections
s greater than would normally be expected at a small mine
ike the one here involved.

The finding above, that complainants engaged in a pro-
ected activity when they declined to complain to MSHA
bout what Cline believed to be excessive inspections, is
nly one part of the two-step discrimination test which
ust be met under the Commission's guidelines hereinbefore
uoted from the Gravely case. The other part of the test
s that a complainant must also show by a preponderance of
he evidence "that some adverse action against him was
otivated in any part by that protected activity." The
omplainants have clearly failed to establish by a prepon-
erance of the evidence that any adverse action was taken
gainst them because they refused to complain to MSHA
bout Inspector Franco's frequent examinations of the mine.

The strongest evidence which complainants were able
o adduce in support of their claim that they were laid off
ecause of their refusal to complain to MSHA is that in each
f the lay-off slips given to each of the complainants,
line gave as the reason for the lay-off "[c]an't make it

tions as the sole reason given for laying them off shows that he wanted to make it clear to them that their refusal to complain to MSHA was causing them to be laid off. As I have already discussed at length above, the preponderance of the evidence does show that Cline needed more than an average of the 157 tons of clean coal per day which the mine had been producing during its 4 months of operation to be profitable (Finding Nos. 19 and 20 above). Cline's contract with Powellton required him to produce a minimum quantity of 250 tons of clean coal per day (Exh. C, p. 8). Powellton's witness testified that he knew just from looking at Cline's production records that he could not remain in business and that Cline did not need to tell him that he was going to have to close the mine (Tr. 260).

The record provides ample facts to support Cline's claim that he had lost $71,000 in operating the mine prior to the time when he closed it on November 8, 1983 (Finding No. 20 above). Despite Cline's need to produce more than 157 tons of clean coal to make it economic to operate the No. 31 Mine, Cline's average daily production dropped to only 56.2 tons of clean coal per day during the period from October 26 to November 3, 1983, when Inspector Franco was making his quarterly, or "AAA," inspection of Cline's mine (Finding No. 19 above). Regardless of the safety and health benefits which may have been associated with the inspector's protracted examination of Cline's mine, the fact remains that his poorest production had occurred during the 2 weeks preceding his closing of the mine and that poor production had occurred while Inspector Franco was making his inspection. In such circumstances, Cline simply stated the truth in his lay-off slips when he said that he was laying the miners off because he could not "make it due to so many mine inspections" (Exh. 9).

Complainants state in their brief (p. 8):

> The Union concedes that an operator may go out of business if he does not want to invest the capital and resources necessary to run the mine safely. Thus it is not a violation of the Act if an operator says to his employees that he has gone out of business because he cannot afford to comply with the provisions of the Act

of low coal production, but the evidence also shows that Cline did not close the mine because of any unwillingness to invest in necessary equipment or correct violations cited by MSHA. Cline rented one continuous-mining machine from Powellton, but he purchased a second machine with his own funds in an effort to stay in business (Tr. 183; 193). Cline also invested in the spare parts and other materials which were required to correct the violations cited by MSHA (Finding No. 21 above). Cline stated that he offered to pay the miners 2 hours overtime if they would produce eight cuts, or 320 tons of raw coal each day, but he said that the miners only produced that much coal two or three times (Tr. 175). Woods' Exhibit 12 shows that the miners produced eight cuts of coal three times in September and once in October. The miners even produced 10 cuts of coal on October 5, 1983. Therefore, as Cline stated, it was possible to produce eight cuts of coal during a single working shift, but the miners failed to do so. As finding No. 12 indicates, complainants' Exhibit 12 fails to support complainants' argument that the low production in the mine was caused by constant breakdowns of the equipment.

Regardless of the reason, the preponderance of the evid shows that Cline was unable to produce enough coal in the No 31 Mine to make his operation profitable and he was forced t close the mine for the sole reason that he was unable to sel enough clean coal to Powellton to make it economic for him t continue to produce coal at the No. 31 Mine. Therefore, com plainants failed to prove a prima facie case of discriminati because they were unable to establish that Cline took any adverse action against them because of their protected activ of refusing to complain to MSHA about the numerous inspectio which MSHA was conducting at Cline's No. 31 Mine.

Complainants' Contention that Howard Cline Violated Section 105(c)(1) of the Act When He Laid Them Off because they Refu To Complain to MSHA about the Frequency of Inspections at th No. 31 Mine

Complainants' brief (pp. 11-15) makes essentially the s arguments in support of its claim that Cline violated sectio 105(c)(1) when he laid the complainants off on November 8, 1983, which were made in the previous portion of their brief

to complain about MSHA inspections for
reasons.

The gist of complainants' argument is contained in the following paragraph from page 14 of their brief:

> No operator should be permitted to idle his employees because they want their mine inspected. While the law cannot compel an operator to stay in business, in cases such as this, where the operator reopens the same mine, with the same equipment, the same employees, the same superintendent, and the same, unabated violations, it is clear that he never really went out of business. Rather, he shut down his operations as a signal to his employees that enforcement of the Act could have a detrimental effect on their livelihood.

In order for me to agree that the record supports the contentions made in the paragraph quoted above, I would have to ignore most of the exhibits presented by both parties and about half of the testimony because the preponderance of the evidence simply does not support complainants' argument that they were laid off because of their refusal to complain to MSHA about inspections being made at the No. 31 Mine.

I have already demonstrated from the record in the preceding portion of this decision that complainants were laid off solely for economic reasons. Additionally, Cline testified that he called some of the miners back on November 15, 1983, because he thought he had sold the mine to two men named Hopkins and Smith, but that they left after trying to operate the mine for only 2 hours and sacrified a $30,000 down payment rather than try to operate the mine with the crew of miners who necessarily had to be used at the mine under any contract which a new operator had to sign with Powellton (Finding No. 15 above). Complainants' witness Griffin knew that Cline was trying to sell the mine to Hopkins and Smith and agreed that they had come to the mine on November 15, 1983, and tried to operate the mine for just one morning (Tr. 46). While Griffin claimed that they refused to take over the mine because they found it in poor condition, rather than because complainants were

The above incident is entirely ignored by complainants and it greatly erodes their argument that Cline laid the miners off for a month solely to discipline them for refusing to complain to MSHA about frequent inspections. The incident with Hopkins and Smith shows that Cline was trying to sell the mine at the time he laid complainants off. If he had been successful in selling it to Hopkins and Smith, complainants would have been rehired by Hopkins and Smith on November 15, or just 1 week after they had been laid off on November 8, 1983.

Another fact which complainants ignore in arguing that Cline laid them off for a month and then rehired them with no changes in the operation is that their Exhibit 13 shows that Cline was trying to sell his personally owned continuous mining machine to the four men who began operating the mine in the name of Chickasaw, Inc. They did not pay Cline the full amount of $15,000 required under their contract with Cline and Cline gave the continuous-mining machine back to the man from whom he had purchased it in the first place (Tr. 193). Therefore, Chickasaw was not, as complainants contend, operating with all the same equipment which Cline had been using when he laid them off.

The complainants' contention that Cline operated under the name of Chickasaw, Inc., is not supported by complainants own Exhibit 8 because that exhibit contains at least four subsequent action sheets written by Inspector Franco on December 15, 1983, showing that he recognized that the "[t]he operating officials of this mine have recently changed." The inspector's subsequent action sheets also reflect that Inspector Franco recognized Aaron Bolan to be the superintendent of the No. 31 Mine--not Howard Cline, as contended by complainants.

As I have pointed out several times, complainants also misrepresent the facts when they argue that Cline reopened the No. 31 Mine in the name of Chickasaw, Inc., with the same unabated violations which had been cited by Inspector Franco (Finding No. 21 above). Finally, complainants have been

owned Chickasaw, Inc.; and [illegible]
under the name of Chickasaw, Inc. (Tr. 47; 65; 67; 98

Counsel for complainants stated at the hearing t
a large extent, our case rests upon establishing that
Algonquin and Chickasaw were basically alter egos, th
was the same man operating the mine" (Tr. 123-124).
preponderance of the evidence shows that complainants
to establish that Cline operated and owned Chickasaw
after complainants were recalled on December 5, 1983
Nos. 16 and 21 above).

I find that complainants' second contention to
that Cline laid them off on November 8, 1983, and re
them on December 5, 1983, to discipline them for ref
complain to MSHA about the frequency of inspections
No. 31 Mine must be rejected for the reasons given i
portion of my decision and also for the reasons give
previous portion of my decision which demonstrated f
preponderance of the evidence in this proceeding tha
plainants were laid off solely for economic reasons,
than for their refusal to complain to MSHA about the
of inspections at the No. 31 Mine.

The discussion above of complainants' arguments
that they have failed to prove a prima facie case of
nation under the two-pronged test which I quoted fro
Commission's Gravely decision at the outset of my co
of complainants' arguments. They did establish the
part of the test by showing that they were engaged i
tected activity when they refused to complain to MSH
excessive number of inspections which Cline believed
being conducted at his mine, but they failed to esta
second part of the test by proving that Cline laid t
or took any adverse action against them solely becau
their refusal to complain to MSHA as he had requeste
do.

a prima facie case of discrimination, it is unnecessary and necessary for me to consider their arguments to the effect that Cline failed to present credible testimony in support of his claim that he had laid complainants off for legitimate business reasons. In this instance, however, it is essential that I discuss their challenges to Cline's credibility because I have based some of my findings as to Cline's inability to operate the No. 31 Mine economically on Cline's testimony. Moreover, complainants, on pages 15 through 20 of their brief, have made arguments which are either incorrect or which misstate the facts. It is essential that those erroneous statements be corrected.

Complainants begin their arguments against Cline's credibility by conceding that Cline was always seeking to have them produce more coal than they were mining, but they claim that Cline never threatened to close the mine because of low production. They then argue that if Cline had laid complainants off because of their low production, he would have included that as a reason for laying them off when he wrote the lay-off slips which only say that he could not "make it due to so many mine inspections" (Br. 15-16).

I have already considered the above contentions and have shown in finding Nos. 19 and 20 that Cline produced only 157 tons of clean coal on an average daily basis and produced only 105 tons of clean coal on an average daily basis when inspectors were present at the mine. Cline produced only 56 tons of coal on an average daily basis during the 6 days when Inspector Franco wrote 24 citations and two safeguard notices (Finding No. 19 above). Since Inspector Franco's inspection ended just 4 days before Cline laid complainants off and closed his mine, there was no way for him to separate low production in his mind from his belief that his mine was being subjected to so many inspections that he had concluded that MSHA was out to drive him out of business through harassment (Tr. 220-221). Consequently, if Cline's mental condition is properly understood at the time he wrote the lay-off slips, his statement that he could not "make it due to so many mine inspections" means that he could not operate the mine economically becaus the inspections had reduced his average daily output of clean coal to 56 tons.

low pa[illegible] losing a great deal of m
above shows that Cline was losing a great deal of m
every month because of low production. Powellton's
with Cline shows that he was required to produce a
minimum quantity of 250 tons of clean coal, but he
an average of only 157 tons during the 4 full months
he was able to operate the mine (Finding No. 19 abo
Powellton's witness stated that he knew from lookin
the production records that Cline could not continu
business with the low production he was getting fro
mine (Tr. 260).

Complainants' brief (p. 16) begins its direct
on Cline's credibility by asserting that the record
not support Cline's statement that his production f
No. 31 Mine averaged only 150 tons of clean coal pe
Complainants contend, instead, that his average dai
duction for the months of July and August show an a
of 208.89 and 214.04 tons, respectively. I have al
shown in finding No. 19 above and in my discussion
page 18 of this decision that complainants have tot
misstated and misused Exhibit 14 in arriving at the
average daily production figures relied upon in the
As shown in finding No. 19 above, Cline's average d
production for the 4 months during which he operate
31 Mine was 157 tons of clean coal. Therefore, Cli
testimony to the effect that his average production
"about" 150 tons (Tr. 174) is only 7 tons less than
actual calculations show the production to be. I d
believe that his use of a figure which is off by 7
so far from the facts as to support a conclusion th
testimony must be dismissed for lack of credibility
contended by complainants.

Complainants' brief (p. 17, n. 9) claims that
"became entangled in his own forest of lies" when
at one point in the hearing that he needed 225 to
of clean coal to break even (Tr. 175) and later te
that he needed only 200 to 240 tons of clean coal
While Cline did use a slightly different range of
tonnage at page 182 from the tonnage given at page
Cline was answering a different question on page 1
his counsel had asked him how much coal he could e

in his testimony, Cline was again asked about the tonnage of clean coal which would be required for him to remain in business and he again stated the figures which he had first given in his direct testimony, that is, from 225 to 250 (Tr. 219). Cline's slight inconsistency in clean coal tonnage, when considered in light of the questions asked, can hardly support a finding that Cline "became entangled in his own forest of lies," as contended by complainants.

Complainants' brief (p. 17) contends that Cline "was probably making a sizeable profit" during the months of September and October 1983. They base that claim on assumptions that Cline was selling Powellton 150 tons of clean co per day for which Powellton was paying him $25.20 per ton a a belief that Cline's labor costs could be calculated by multiplying 8 hours by the miners' hourly rate of $26.14, including all fringe benefits for hospitalization, pensions etc. Using the above figures, complainants' brief states that Cline was being paid $3,780.00 per day (150 tons x $25.20 = $3,780.00) for the coal he delivered to Powellton' preparation plant. Complainants then allege that Cline's cost of wages for 14 miners was $2,593.92 ($26.14 x 8 hours $209.12 x 14 miners = $2,927.68) per day. [NOTE: The corre amount is $2,927.68, but complainants' brief uses an incorr figure of $2,593.92 which is $333.76 less than the actual c of labor even if one uses complainants' assumptions and bas hourly rate.] Complainants then subtract the erroneous wag amount of $2,593.92 from the amount Cline is getting paid f clean coal of $3,780.00 and arrive at a result of $1,186.08 as an amount which complainants say was mostly "pure profit (Br. 18).

When complainants' alleged "pure profit" of $1,186.08 is reduced by an additional $333.76 to correct complainants error in calculating the daily wage costs, Cline's alleged daily profit is reduced to $852.32. The alleged profit of $852.32, even after correction, is still greatly overstated because it fails to allow any amount for cost of such items as roof bolts, rock dust, timbers, ventilation curtains,

mine to Powellton's preparation plant, and the cost to Cline of hiring three foremen which Cline used to supervise the 14 miners whose total wage cost has been computed to be $2,927.68 per day.

If the miners were getting the equivalent of $209.12 per day in wages and fringe benefits, three foremen ought to be paid at least $200 per day or $600 in total salaries. The investigator's report in Exhibit 7 states that Cline was employing three foremen.

The accounting sheets in Exhibit 7 show that Cline incurred $15,515 in September and $15,791 in October for materials, supplies, spare parts, and telephone services. Cline incurred $475 in September and $1,230 in October for respirable-dust sampling and other professional services, and had to pay an unknown amount for the 135 and 144 truck-loads of coal in September and October, respectively, involve in transporting his coal from the mine to the plant. No amount needs to be added for the cost of equipment rental ($1.50 per ton) or electricity (30 cents per ton) because complainants deducted those charges by subtracting $1.80 per ton from Powellton's payment of $27.00 per ton for clean coal Although Cline had to pay wages and salaries for more days in September and October than the 19 and 20 days, respectively, assumed by complainants in determining the quantity of clean coal which Cline sold to Powellton during those months, I shall use a 20-day month for the purpose of estimating a daily cost for the items complainants ignored in claiming that Cline was making about $1,186.08 each day in "pure profit."

A calculation of Cline's minimum daily loss from operati the No. 31 Mine can be computed as follows, using complainant clean coal production of 150 tons per day and their daily hou wage rate of $26.14:

$3,780.00 - Daily clean coal receipts ($25.20 per ton x 150 = $3,780)

-2,927.68 - Daily wages paid to 14 miners ($26.14 x 8 hours x 14 = $2,927.68)

- 600.00 - Daily salaries for three foremen ($200 x 3 = $600)

- 150.00 - Daily cost for $1,000,000 of liability insurance ($3,000 ÷ 20 = $150)

- 0.00 - Unknown amount for transporting coal from mine to preparation plant

$ (689.68)- LOSS per day incurred by Cline as a result of operating the No. 31 Mine

Complainants' brief (pp. 18-19) lists nine items which are relied upon as support for their claim that Cline's testimony is not credible. The first contention is that Cline claimed to have sold all his interest in Chickasaw, but they say that the agreement (Exh. 13) which he signed with the purchasers retained for Cline a reversionary interes in the company. They say that Cline's explanation (Tr. 195) that he had that provision inserted into the agreement to make the sale appear to be more attractive to the purchasers is nonsensical. The provision to which complainants refer states that "[i]n the event the parties of the second part wish to quit mining as a further consideration to Howard W. Cline agree to transfer to the said Howard W. Cline all the stock in Chickasaw, Inc., if the said Howard W. Cline so requests" (Exh. 13, p.2).

When complainants' counsel asked Cline about the meaning of the so-called reversionary clause, he stated that "[t]here no way" he would have taken back Chickasaw, Inc. (Tr. 191) an he explained subsequently that when a person is trying to sel something, "you've got to make it sound interesting and attra tive" and he said he had that provision inserted in the contract so that the purchasers would think that he was selling something that he would like to reacquire if the purchasers failed to go through with their part of the bargain (Tr. 195) He further stated unequivocally that he had not asked for the stock to be returned and that if he had regained Chickasa Inc., he would only have received "a lot of debts."

I disagree with complainants' contention that Cline's explanation of the reason for having the aforesaid provision inserted in his contract with the purchasers is "nonsensical. Cline received only a down payment of $5,000 with another $10,000 to be paid subsequently, along with payment by

more than the down payment. In this instance, Cli
interest in the mine was not worth more than the do
ment. Actually the down payment was made in order
purchasers to acquire a continuous-mining machine
Cline, but Cline made it appear that he was still
in the mine by inserting a provision that he could
return of the stock in Chickasaw, Inc., if the purc
failed to perform their part of the agreement. Tha
be considered to be a "nonsensical" provision.

The circumstances which complainants give in
their second attack on Cline's credibility begin wi
assertion that Cline claims to have retained no in
Chickasaw's operations after December 2, 1983, but
Cline filed a Legal Identity Report with MSHA date
1983, showing that Chickasaw was the operator of t
Mine and that Cline was its president (Exh. 11).
claimed that Cline signed job-posting slips on Dec
1983, showing the jobs open at the No. 31 Mine and
that Cline was Chickasaw's superintendent (Exh. 1)

There is nothing inconsistent about the occur
above-described transactions. First, there is no
complainants' contention that Cline claimed to hav
no interest in Chickasaw after December 2, 1983.
happened was that Cline signed an agreement on Dec
1983, in which he agreed to transfer all stock in
to the men who subsequently operated the No. 31 Mi
name of Chickasaw, Inc. That agreement required C
obtain a new operating agreement with Powellton an
that, once signed, the new agreement would be atta
agreement signed on December 2, 1983. The agreeme
Powellton and Chickasaw was subsequently signed on
1983 (Exh. D), and the Legal Identity Report was a
to MSHA on December 5, 1983 (Exh. 11). It should
December 2, 1983, was a Friday and that the next w
was Monday, December 5, 1983. Therefore, it is ur
that Cline would not have been able to perform all
ments in the contract on December 2, 1983, when th
was signed. Cline testified that, as a condition

(Finding No. 16 above).

There is nothing in the record to show that Cline failed, aimed, to transfer all the stock in Chickasaw, Inc., to urchasers named in the agreement signed on December 2, At least four of the subsequent action sheets written spector Franco on December 15, 1983, show that the ctor recognized that new persons had taken over the tion of the No. 31 Mine and that Aaron Bolan, one of urchasers named in the agreement of December 2, 1983, hen superintendent of the No. 31 Mine (Exh. 8). The discussion shows that there is no merit to complainants' ntions that Cline continued to hold an interest in asaw after he had transferred the stock to the men who ased Cline's interest in the No. 31 Mine.

The third incident used by complainants to attack Cline's bility is their contention that Cline claims to have ased a Lee Norse continuous-mining machine for $175,000 182), but that he never did pay for it and returned it e seller (Tr. 193). Cline did not say, as complainants nd, that he paid $175,000 for a Lee Norse. He said that cost $175,000 (Tr. 183) and that he made a down payment and "gave it back to the guy" he bought it from (Tr. 193).

No one asked any additional questions about the Lee which Cline obtained for use at the No. 31 Mine, but it irly safe to conclude from his statement that he gave it to the "guy" he bought it from, that it was a used ne which was not worth nearly as much as the $175,000 which was elicited from Cline by his counsel (Tr. Moreover, as I have already explained in finding 6 above, Cline tried to sell the Lee Norse for $15,000 e men who began operating the mine in the name of Chick- Inc., but was unable to do so because they never did im anything after making the required $5,000 down payment e time they began to operate the mine. If Cline had ctually brought a Lee Norse on to mine property, there have been no reason for him to provide for its sale e men who began operating the mine in the name of asaw. Additionally, it should be noted that complainants' ss Eplin testified that Cline brought another continuous- g machine into the mine and that he tried to mine coal

a used machine [illegible] $15,000 which he tried to get for it from the men operating the mine under the name of Chickasaw. I event, I find nothing in the record which shows th credibility was greatly damaged because of his sta that he made a down payment on a Lee Norse continu machine and than gave it back to the person from w obtained it.

The fourth incident which complainants list a in attacking Cline's credibility is that he claims potential buyers failed to follow through on an in purchase of Cline's interest in the No. 31 Mine wh encountered the "radical" work force at the mine. offered Cline $50,000 for his interest and had mad payment of $30,000. They forfeited the $30,000 do and left the mine rather than operate it with comp as the required work force (Tr. 168; 210). I have provided a summarization of this incident in findi above. Complainants' own witness Griffin testifie was aware of the fact that Cline had tried to sell to two men named Hopkins and Smith and that they l trying to operate the mine for only a half day. A only difference between Griffin's testimony and Cl to the aborted operation of the mine by Hopkins an is that Griffin said they gave up because of the c in which they found the mine, whereas Cline said t because of the caliber of the work force.

It should be noted that Cline would not have mention the $30,000 down payment which he received Hopkins and Smith or their forfeiture of the down The fact that he did mention the down payment and that he voluntarily stated that their payment had his $71,000 loss in operating the No. 31 Mine all support his claim that the incident occurred. Jus complainants say that Hopkins and Smith acted "mys is not a sound basis for finding that Cline's test should be discounted for lack of credibility.

quantities of clean coal when asked about the amount of coal which had to be produced in order for the mine to be profitable. I have already shown the lack of merit in that contention on pages 36 and 37 above and no further comments required to support a rejection of that argument as a basis for finding Cline's testimony to be lacking in credibility.

The sixth contention made by complainants in support of their attack on Cline's credibility is that Cline testified that there were inspectors at the mine for 3 days each week (Tr. 180), but that Woods' Exhibit 12 shows that production declined because of inspections on only 2 days in September and 2 days in October. Finding Nos. 11 and 19 show beyond any doubt that Cline's mine was the subject of numerous inspections by MSHA. Finding No. 19 shows that there were inspectors at Cline's mine on 3 days in the week of June 20, for 4 days in the week of September 19, for 3 days in the week of October 10, for 4 days during the week of October 24, and for 4 days during the week of November 1. That finding also shows that Cline's average production declined to an average of 105 tons of clean coal for the days on which inspectors were at the mine and declined to an average of only 56 tons of coal per day during the 6 days when Inspector Franco made his inspection at the end of October and beginning of November. There is certainly nothing about Cline's statement as to there having been inspectors at his mine for 3 days each week which requires that I make a finding that his credibility is to be doubted.

The seventh reason given by complainants for doubting Cline's credibility is that he testified he is out of money, unable to pay any kind of civil penalty, and yet is contemplating a return to mining coal in Kentucky or Virginia (Tr. 221; 228-230). As I have already indicated on page 21 of this decision, Cline failed to prove with documentary evidence that he is unable to pay civil penalties, but failure of a witness to present documentary proof is not a sufficient shortcoming to support a finding that his credibility has been destroyed. As I have previously indicated, Powellton's witness stated that Cline, at one time owned a supply company (Tr. 238) and Cline himself stated that he would pay $500 to anyone who would take the defunct Algonqui Coal Company off his hands (Tr. 196). Cline also stated

$1,000, the effort to pay
bankruptcy (Tr. 229). A further indication of Cline's
inconsistency about his financial condition is that Cl
stated that he had bought the Lee Norse mining machine
with his own funds rather than with Algonquin's funds
(Tr. 193). Therefore, complainants have a meritorious
point when they argue that Cline was less than convinc
about his actual financial condition.

On the other hand, the record shows that Cline is
sophisticated in the area of forming corporate enterpr
for the purpose of achieving his various goals. It is
entirely possible that Cline has no personal funds and
the money he does advance for various purposes comes f
a corporate enterprise through which he operates his
supply business, assuming he still owns that sort of b
ness. Also, as complainants have correctly noted, Cli
invested very little of his own capital in operating t
No. 31 Mine under the name of Algonquin Coal Company.
Powellton even agreed to pay Cline $12,000 to enable h
to prepare the mine for active coal production (Exh. P
Therefore, it would appear to be possible for Cline to
find a mine owner, like Powellton, who would finance a
undertaking by Cline to open a mine in Kentucky or Vir
If he could find such a firm, he could open a mine wit
having any funds, as an individual, to invest in openi
the new mine.

I did not personally press Cline to produce docum
evidence at the hearing to support his claim that he c
pay civil penalties because it is the operator's burde
prove that he cannot pay civil penalties if he takes t
position (Tr. 228). As I have pointed out above, Clin
be truthfully stating that he has no funds, as an indi
to pay civil penalties and may, despite that fact, sti
be able to acquire funds through some corporate enterp
which he controls. If the aforesaid mental reservatio
were employed to justify the inconsistent statements h
made about having no money, I would have to find that
disingenuous in dealing with questions regarding his
financial condition.

the fact that each ram car could deliver 100 to 120
s per day to the tailpiece, there would rarely be a
e when all three cars would be required (Tr. 60). Com-
inants' eighth point is either made without a clear
erstanding of the way a mine is operated or with the
e that the judge does not know how a mine is operated.
discussions about the use of ram cars have to begin
n the assumption that the continuous-mining machine is
rating. When that machine is operating, the goal is
nove coal away from it as fast as it is produced.
refore, even if the continuous-mining machine does not
rate but 1 hour in a single day, Cline would prefer to
e the three ram cars taking the coal away from the
hine so that there is little delay between the time one
is filled with coal and the next one moves up to be
led. The testimony also shows that long haulage dis-
ces existed between the location of the face equipment
the tailpiece (Tr. 147). Thus, three ram cars would
ily be needed in order to keep the continuous-mining
hine operating at an efficient rate of production.
sequently, the mere fact that a single ram car may be
e to deliver 120 tons to the tailpiece in an entire day
not the same as having the ability to take coal from
continuous-mining machine as fast as it is cut at the
e. Witness Griffin was a ram-car operator and was also
miner who most frequently accompanied inspectors
suant to section 103(f) of the Act (Tr. 70; 207). He
tified that only two ram cars were used at times even
no inspectors were at the mine, but he was unable to
how much his acting as the person to accompany inspec-
s interfered with production by reducing the ram-car
rators to two instead of three (Tr. 72).

Cline rather convincingly proved his point with respect
his use of three ram cars by pointing out that he would
hire a third ram car operator (at a cost of $26.14 per
r, according to complainants' brief, p. 17) if he did not
e a need to operate three ram cars 90 percent of the
e (Tr. 207). The evidence, therefore, does not support
plainants' argument that Cline's testimony about use of
ee ram cars served to erode his credibility.

a basis to attack Cline's credibility is that while Cline primarily attributed his failure to be able to operate the mine profitably to his having to use an unsatisfactory labor force, he gave as his only reason for laying off complainants that he could not "make it due to so many mine inspections" (Exh. 9; Tr. 177). I have repeatedly dealt with this same argument by pointing out that in Cline's mind, the production which he lost when the miners failed to produce coal because of the presence of inspecto made him feel that inspections and low production were suc simultaneous occurrences, that stating the existence of inspectors was the same as stating that he could not opera because of low production (Finding No. 19 above).

I have reviewed above in some detail the nine reasons given by complainants for their allegation that Cline's inconsistent statements require that a finding be made to the effect that his testimony cannot be accepted as credib My discussion shows that the preponderance of the evidence supports Cline's statements in all areas except his failur to be fully candid about his financial condition. I can appreciate a person's unwillingness to produce his tax returns and provide other documents which show his exact financial condition. Cline failed to prove that he cannot pay civil penalties, but his failure in that limited area of evidence is not a sufficient defect in his overall performance as a witness to support a finding that his entire testimony must be discounted for lack of credibilit

The last paragraph of complainants' brief (p. 20) under their argument to the effect that Cline failed to give legitimate business reasons for laying complainants off on November 8, 1983, consists of a continuous, uninter- rupted misstatement of the evidence in this proceeding. M decision has already taken each of the allegations made in that paragraph and has shown that not a single statement made in that paragraph is supported by the preponderance of the evidence. Lest complainants think for a moment tha those statements are acceptable to me, I shall repeat that the evidence does not support their claim that Cline resum operating the No. 31 Mine on December 5, 1983, under the name of Chickasaw, Inc. The record shows unequivocally th Chickasaw was operated by four men and that all Cline did was form that corporation as one of the conditions for his

It is contrary to the entire record for complainants assert that there was no shortage of persons waiting the chance to operate the No. 31 Mine at the time ckasaw, Inc., went out of business owing the miners wages which were paid by Powellton (Finding No. 5 ve). Complainants' own witness Griffin testified that or to Cline's failure to be able to operate the No. 31 profitably, three other companies had failed for economic sons (Finding No. 2 above). Powellton's witness testified his superior had even told him not to sign a contract any more companies allowing them to operate the No. 31 e, but that he made an exception in Cline's case because Cline's previous good record for being able to get along the miners who would have to be used to operate the e under the UMWA Wage Agreement (Finding No. 3 above).

The fact that the complainants who testified in this ceeding were unemployed at the time the hearing was held ws that the No. 31 Mine is no longer "an ideal setting," complainants contend, for an individual to open a coal e (Tr. 21; 93; 99). The preponderance of the evidence ws beyond any doubt that Cline could not economically rate the No. 31 Mine and would have had to lay off all complainants for that reason even if complainants had refused to complain to MSHA about the numerous inspec-ns which were being made at the mine (Finding Nos. 1-3, 12, 15-20).

It should be noted that I have not made many references the brief filed by Powellton's attorneys in this pro-ding. My lack of references to Powellton's brief results m my having found that most of Powellton's arguments supported by the record. It is unnecessary for me to end this lengthy decision by discussing arguments with ch I am in general agreement. Powellton's brief (p. 13, 9) does, however, raise one objection which requires e consideration. Powellton's brief there refers to achment A in complainants' brief. Attachment A consists a tabulation showing the overall cost of employing a er under the UMWA Wage Agreement if one includes all nge benefits.

Attachment A was not offered in evidence at the hearing, the calculations in Attachment A were based on the Wage Agreement which is Exhibit A in this proceeding. Powellton's witness demonstrated a thorough understanding of Exhibit A and I am confident that if complainants had misapplied the Wage Agreement in calculating the cost of hiring UMWA miners, Powellton's attorneys would have been able to show in a rebuttal exhibit of their own that the factors used by complainants in their Attachment A are incorrect.

I have examined Attachment A in some detail and I have shown in Appendix A to this decision that complainants used a higher basic hourly rate than is supported by the tes mony or Exhibit A and I made that change in calculating the losses incurred by Cline in operating the No. 31 Mine. As a matter of fact, it appears that Cline benefits from my use of the information given by complainants in Attachment A more than complainants do. I believe it is preferable to consider all contentions of the parties on the merits rather than to reject them on technical grounds. Since my consider ation of Attachment A on its merits has had results which support all of Powellton's arguments, Powellton can hardly claim that my consideration of Attachment A has been pre- judicial to it in any way. Therefore, Powellton's objection to my consideration of Attachment A is overruled.

Complainants' Argument that Powellton, as Owner of the No. 3 Mine, Is Strictly Liable for All Violations of the Act Committed by Powellton's Independent Contractors

Complainants rely upon a line of Commission and court decisions 3/ pertaining to the liability of mine owners for

3/ Republic Steel Corp., 1 FMSHRC 5 (1979); Kaiser Coal Cor 1 FMSHRC 343 (1979); Consolidation Coal Co., 1 FMSHRC 347 (1 Old Ben Coal Co., 1 FMSHRC 1480 (1979); Monterey Coal Co., 1 FMSHRC 1781 (1979); Republic Steel Corp. v. Interior Bd. of Op. App., 581 F.2d 868 (D.C. Cir. 1978) Cyprus Industrial Mi Co. v. FMSHRC, 664 F.2d 1116 (9th Cir. 1981); Harman Mining v. FMSHRC, 671 F.2d 794 (4th Cir. 1981); and Phillips Uraniu Corp., 4 FMSHRC 549 (1982).

for violations of section 105(c) by its independent contrac
tors and I tentatively denied Powellton's motion to dismiss
at that time pending my giving complainants an opportunity
to prove that the relationship between Powellton and its
independent contractors warranted application of the cases
on which complainants rely.

Powellton renewed its motion to dismiss after I issued
the prehearing order and complainants filed a reply in oppo
tion to the grant of Powellton's motion. Copies of the
contracts between Powellton and Chickasaw were submitted by
the parties in support of their opposing positions. I issu
an order on August 7, 1984, in which I reviewed in detail
the contracts between Powellton and its independent contrac
and concluded that Algonquin and Chickasaw were acting as m
agents for Powellton and that Powellton should be held to b
liable for any violation of section 105(c)(1) pending the
receipt of evidence by the parties at the hearing which was
scheduled by the order denying Powellton's motion to dismis
it as a party to this proceeding. Therefore, Powellton
correctly points out in its brief (p. 16) that I have never
held in this proceeding that Powellton is liable for violat
of section 105(c)(1) which may be committed by its independ
contractors.

The remainder of Powellton's brief (pp. 17-20) demon-
strates by references to the testimony of witnesses Holbroo
and Cline that its contracts with Algonquin and Chickasaw,
when properly understood, do not create an agency relation-
ship between Powellton and Algonquin or Chickasaw.

It is true, as complainants contend, that the court in
Cyprus case held that mine owners are strictly liable for t
actions of independent contractors and further stated that:

> The Secretary [of Labor] presents sound policy reasons for holding owners liable for violations committed by independent contractors. For one thing, the owner is generally in continuous control of conditions at the entire mine. The owner is more likely to know the federal safety and health requirements. If the Secretary could not cite the

[Emphasis in Original.]

644 F.2d at 1119.

At the outset of this discussion of complainants' contentions that Powellton be held liable for any violation of section 105(c)(1) which might be committed by its independent contractors, it should be noted that the Commission and the courts, in the cases relied upon by complainants, were not dealing with the type of violation which is here involved. The owners of the mines in those cases were the actual operat of the mines in terms of extracting materials from the earth and they had hired independent contractors to do isolated construction acts, such as digging a tunnel to assess talc deposits, or constructing a ventilation shaft. The violations involved were failures to comply with specific mandatory health and safety standards cited by Federal mine inspectors.

The violation at issue in this case involves a mine owner (Powellton) which no longer actively produces coal (Finding No. 1 above). Powellton, therefore, is outside the normal factual conditions which have existed in the cases which have come before the Commission and the courts, in that no Federal inspector has issued a citation charging that Powellton violated a mandatory safety standard while operating a mine at which an independent contractor has been hired for the limited purpose of performing a specific construction project.

Therefore, in the instant proceeding, complainants are performing the function which would ordinarily be carried out by a Federal mine inspector in that they are alleging the violation of the Act which is being used as a basis for claiming that Powellton, as well as its independent contractor, is liable for the violation of section 105(c)(1) here involved. Moreover, complainants introduced evidence showing that Federal mine inspectors have conducted numerous inspections of the No. 31 Mine here involved and have issued many citations which name the independent contractor as the "operator" of the No. 31 Mine. Consequently, it is somewhat

A further complication which arises when one tries to apply the existing case law governing citation of productio operators for violations committed by independent contracto is that the 1977 Act extended the definition of an operator to include independent contractors and the Secretary has developed regulations (30 C.F.R. §§ 45-1-45.6) which contro to a large extent the question of whether a mine owner should be cited for violations by independent contractors. Section 45.2(c) of those regulations defines an independent contractor as "any person, partnership, corporation, subsidiary of a corporation, firm, association or other organi tion that contracts to perform services or construction at mine." Section 57.2(d) defines a production-operator as "a owner, lessee, or other person who operates, controls or supervises a coal or other mine."

While it is true that Algonquin and Chickasaw necessar performed services and construction at Powellton's No. 31 M the contracts show that Powellton wanted its coal "mined" a that Algonquin and Chickasaw desired "to mine such coal" an deliver it to Powellton's preparation plant (Exhs. C and D, p. 1). On the other hand, Powellton, Algonquin, Chickasaw, and Cline all fit into the definition of production-operato in section 45.2(d) because each of them can be considered t be an "owner, lessee, or other person who operates, control or supervises a coal or other mine."

The primary reason that complainants included Powellto as a respondent in their action is that they feared that Cl might not be financially able to pay the back wages they se if a violation of section 105(c)(1) should be proven.

Although the above discussion shows that a discriminat case is not really adaptable to the law and regulations pertaining to citing operators for independent contractors' violations, I shall try to evaluate complainants' arguments in light of the Secretary's regulations and the most recent Commission decision on the subject. In its decision in Cathedral Bluffs Shale Oil Co., 6 FMSHRC 1871 (1984), the

the citing of operators for independent contractors violations. The Secretary expressed those criteria as follows:

> as a general rule, a production-operator may be cited for a violation involving an independent contractor: (1) when the production-operator has contributed by either an act or omission to the occurrence of a violation in the course of an independent contractor's work, or (2) when the production-operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor, or (3) when the production-operator's miners are exposed to the hazard, or (4) when the production-operator has control over the condition that needs abatement.

6 FMSHRC at 1873.

The violation alleged in this proceeding is that Cline laid complainants off in violation of section 105(c)(1) because complainants had refused to comply with his request that they complain to MSHA about the excessive number of inspections which Cline believed were being conducted at the No. 31 Mine. Assuming, arguendo, that complainants had been able to prove that a violation occurred, it is clear that Powellton did nothing by way of omission or comm sion which could justify Powellton's being cited for the vi lation under the Secretary's guidelines quoted above. The contracts (Exhs. C and D) show that Powellton requires its independent contractors to hire complainants as the work force in the No. 31 Mine and requires them to comply with all safe mining procedures. Powellton requires its independent contractors to report the hours worked by its employees so that Powellton can submit payments to UMWA's pension funds at the proper times and thereafter bill its independent contractors for those payments. Powellton agreed to pay Cline $12,000 so that he could prepare the mine for safe operation. Powellton requires its independen contractors to procure accident and health insurance from a carrier approved by Powellton. It is difficult to imagine any act which Powellton could take to assure that the miner

ne continued existence of the alleged violation inas-
as Powellton agreed to sign a new contract so that
ner operator could have taken over the No. 31 Mine on
mber 15, 1983, just 1 week after Cline had laid off
lainants, if Cline's prospective successor had not left
ine after trying to operate the mine for only a half
(Finding No. 15 above). Powellton did sign a new
act with Chickasaw so that the miners could be called
to work on December 5, 1983. Therefore, Powellton
ll that it could have done to assure that the miners
be given jobs as soon as any operator could be found
line to take over operation of the No. 31 Mine.

Powellton cannot be held to be liable as a production-
tor under the fourth criterion quoted above because
lton did not hire any of the miners who worked for
, Algonquin, or Chickasaw and did not in any way super-
them, discipline them, or have anything to do with
having been laid off (Finding No. 5 above).

The above analysis of the facts in this proceeding
the criteria expressed by the Secretary for determining
a production-operator should be cited for violations
ted by its independent contractor show that a Federal
ector would not be able to establish a basis for citing
lton for the violation of section 105(c)(1) alleged
mplainants in this proceeding.

It should also be noted that Powellton does not come
n the purview of the factors quoted above from the
.'s decision in the Cyprus case. The court referred
he fact that an owner or production-operator has "con-
ous control" of conditions at the "entire" mine and is
ntity best able to maintain healthful and safe condi-
s at its mine. Powellton specified in its contracts
its independent contractors were required to comply
all safety and health standards. Powellton did not
ect the mine (Tr. 218) and therefore did not exercise
tinuous control" over the "entire" mine as would be
case if Powellton could properly be categorized as a

Complainants also seek to make Powellton liable for the alleged violation of section 105(c)(1) alleged in this case by citing Judge Broderick's decision in UMWA v. Pine Tree Coal Co., 7 FMSHRC 236, 240 (1985), in which Judge Broderick stated that "[b]y analogy [to some of the cases cited on page 48 above] the owner may be held strictly liable to pay compensation to miners idled by a withdrawal order, even though the owner is not the employer of the miners." Complainants' reliance on Judge Broderick's decision is misplaced because in the Pine Tree case, the owner of the mine supervised the independent contractor's activities with respect to mine projections and mine mapping and the owner specifically directed the independent contractor to continue mining into a questionable area which turned out to be a gas well. Judge Broderick believed that the owner could be cited as well as the independent contractor because the conditions giving rise to issuance of the withdrawal order in that case "were the responsibility of the owner" (7 FMSHRC at 240).

As I have already noted in this decision, Powellton required Cline and its other independent contractors to employ an engineer, but it was the independent contractors' responsibility to prepare their own mine maps and perform their own mining projections (Exh. C, p. 5; Tr. 265). The fact that Inspector Franco issued Citation Nos. 2273570 and 2273571 on November 2, 1983, alleging that Algonquin had failed to show mining projections and the date of recent mining activity on the mine map shows that the inspector did not believe that Powellton, as the production-operator, was liable for such violations. Of course, as I have already noted above, Cline, Algonquin, and Chickasaw are production-operators and the contracts between Powellton and its independent contractors do not create the type of relationship which is normally subject to the law governing the citing of production-operators for violations by their independent contractors.

The concluding argument which complainants' brief makes in support of their contention that Powellton should be held strictly liable for Cline's alleged violation of section 105(c)(1) is that:

and have sufficient capital to make a diligent effort to comply with the Act.

I agree that "justice" would be served by holding Powellton liable for Cline's alleged violation if the facts in this case did show that Cline was running his mine without making any effort to comply with the health and safety standards, if Powellton's contracts with its independent contractors did show Powellton to be in actual control of its independent contractors' work force, and if the violation of section 105(c)(1) alleged in this case could be shown to be an action over which Powellton had any control. Not one of the aforesaid conditions, however, exists in this case.

As I have already indicated on page 24 of this decision, Inspector Franco's 24 citations issued during the last quarterly inspection do not reveal the types of highly serious violations which would have endangered complainants' safety and health to a significant degree. They were mostly routine violations which are normally cited by Federal inspectors during quarterly inspections. The violations were cited between October 26 and November 3, 1983. Although Cline closed his mine on November 8, 1983, he had abated 17 of the 24 alleged violations by November 3 before closing the mine. Therefore, his prompt action in abating the alleged violations is not the type of response to the citing of violations which would be expected of an operator who is completely indifferent about safety and who strives to operate by failing to purchase the necessary supplies and equipment. Moreover, the accounting sheets in Exhibit 7 show that Cline paid Powellton about $15,000 per month for supplies, parts, and professional services for the 4 full months of July through October before the mine was closed on November 8, 1983. Those amounts do not indicate that Cline was failing to expend enough money to keep the mine operating in a safe condition.

Finding Nos. 3 through 5 above show that Powellton expects its independent contractors to comply with all safety and health regulations and takes the initiative to see that all payments are made to UMWA's pension funds in a timely manner. Nothing in this record would support a finding that

will provide the miners with safe and healthful working conditions.

A final point should be made about holding Powellton liable for Cline's alleged violation. The uncontroverted evidence shows that Powellton did not at any time ever take any kind of action to hire, discipline, or discharge any of the miners employed by Cline. The violation alleged by complainants is not one which is susceptible to a routine claim that a production-operator is liable for its independent contractors' violations because it consists of a claim that Cline laid off complainants because they refused to complain to MSHA about the excessive inspections which Cline believed were being made at the No. 31 Mine. That s a violation which is unique and which would not occur imply as a direct result of a production-operator's failure o assure that a mine is operated under safe and healthful onditions. A production-operator would have to be intimate aware of an independent contractor's personal relationship with its employees before it could be established that the production-operator knew that an independent contractor was asking its employees to complain to MSHA about the numerous inspections which were being made at the independent contractor's mine. No complainant has charged that Powellton had anything to do with Cline's alleged violation or that Powellton had any reason to know that Cline had ever request the miners to complain to MSHA about an excessive number of inspections.

It is possible that a discrimination case could be file which would justify a finding that a production-operator ought to be held liable for an independent contractor's violation of section 105(c)(1), but I do not believe that the record in this proceeding can be interpreted to warrant a finding that Powellton should be held liable for the violati of section 105(c)(1) alleged by complainants in this proceed

As I understand Powellton's request in the concluding paragraph of its brief (p. 20), it does not request that it dismissed as a party if I find that no respondent committed acts sufficient to establish a violation of section 105(c)(1 Since my decision shows that no violation of section 105(c)(was proven by complainants, the entire complaint will herein after be dismissed.

The complaint filed on March 19, 1984, in Docket No. 84-148-D is dismissed for failure to prove that a ation of section 105(c)(1) of the Act occurred.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

ribution:

R. Pfeffer, Esq., United Mine Workers of America, - 15th Street, NW, Washington, DC 20005 (Certified)

el D. Dahill, Esq., Box 258, W. Logan, WV 25601 rtified Mail)

y W. Blalock, Esq., Jackson, Kelly, Holt & O'Farrell, One Valley Square, P.O. Box 553, Charleston, WV 2 (Certified Mail)

al Pay-ts Re-ved by ne	Equipment Rental, Power, Telephone, Parts, and Supplies	4 Total Cost of Hiring UMWA Miners ($25.69/Hr.)	5 Salaries Paid to 3 Foremen (Estimated)	6 $1,000,000 Liability Insurance (Estimated)	7 Engineering, Respirable-Dust Sampling, Etc. (To Extent Know
,601	$21,320	$47,552	$9,000	$3,000	$ 0
,464	$26,106	$56,569	$9,000	$3,000	$1,200
,568	$22,060	$67,719	$9,000	$3,000	$ 475
647	$22,077	$61,810	$9,000	$3,000	$1,230
187	$ 7,289	$16,595	$3,000	$1,500	$ 200
467	$98,852	$250,245	$39,000	$13,500	$3,105

alculations

n 2 are the actual amounts which Powellton paid Cline for clean coal before deducting fo
ical power, etc., as shown in Exhibit 7.
n 3 are the amounts deducted by Powellton for the items listed. Powellton also deducted
for welfare funds, but I have deleted those deductions because they have been transferre
for wages and other fringe benefits as shown in Column 4.
n 4 are based on a per-hour cost of $25.69 for each hour worked by the UMWA miners hired
e from Exhibit A, page 178, of $13.715 is used instead of the hourly rate of $14.165 sho
ainants' brief. I have used a base rate of $13.715 because that amounts to $109.72 per
gure of $14.165 used in complainants' brief is $113.32 per 8-hour shift. None of the mi
re than $110 per day (Exh. 7, Investigator's Report, p. 5; Tr. 79). The hours worked b
given in Exhibit 7. Therefore, the figures in Column 4 were obtained as follows: 1,85
$47,552; 2,202 hours for August x $25.69 = $56,569; 2,636 hours for September x $25.69
October x $25.69 = $61,810; and 646 hours for November x $25.69 = $16,595.
inued on page 2.)

month for each foreman. It is my understanding that section foremen are generally paid
I have used $36,000 to be conservative. The Investigator's Report, page 5, in Exhibit
ee foremen.
n in Column 6 provide for Cline's purchase of $1,000,000 in liability insurance which C
ide under the contract between him and Powellton (Exh. C, p. 13; Tr. 217).
olumn 7 are the amounts charged Cline for such services as engineering, respirable-dust
services. Cline stated that he paid Larry Heatherman for doing the respirable-dust sa
cted for work done by Larry Heatherman and for work done by Dale Porter. I assume that
r, but he might have been an accountant. In any event, Cline paid the amounts shown fo
ated in Column 7.
n in Column 8 are the results obtained when the gross income in Column 2 is reduced by t
ll of the other columns.

	:	Docket No: WEVA 8
	:	
v.	:	MORG CD 85-11
	:	
DeCONDOR COAL COMPANY,	:	
Respondent	:	

DECISION

Before: Judge Maurer

On February 11, 1985, the Complainant, William J filed a complaint of discrimination under section 105 of the Federal Mine Safety and Health Act of 1977, 30 § 801 et seq., (hereinafter referred to as the "Act") with the Secretary of Labor, Mine Safety and Health Administration (MSHA) against DeCondor Coal Company, That complaint was denied by MSHA and Mr. Buda therea filed a complaint of discrimination with the Commissi his own behalf under section 105(c)(3) of the Act. M alleges that he was discriminated against in violatio section 105(c) of the Act because he was laid off on October 2, 1984 by DeCondor Coal Company and has not called back to work although two men with less senior have been recalled. He goes on to state that he has experience and more seniority than these two men and for should have been called back to work before them.

The undersigned administrative law judge's revie the initial pleadings in this case raised the legal i of whether the Complaint states a claim for which rel can be granted under section 105(c)(1) of the Act. O May 28, 1985, an ORDER TO SHOW CAUSE was issued by th undersigned wherein the Complainant was ordered to sh cause within fifteen (15) days as to why this proceed should not be dismissed for "failure to state a claim which relief can be granted under section 105(c)(1) o the Act." The only response received to date was a M 1985 telephone call from the Complainant essentially reiterating his original complaint.

in support of a claim. Pleadings are, moreover, to be liberally construed and mere vagueness or lack of detail is not grounds for a motion to dismiss. Id.

Section 105(c)(1) of the Act provides as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or caus discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or applicant for employment has instituted or caused to be instituted any proceedings under or related to this Act or has testifie or is about to testify in any such proceeding, or bec of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

In order to establish a prima facie violation of section 105(c)(1) the Complainant must prove that he engag in an activity protected by that section and that his discharge was motivated in any part by that protected acti Secretary ex. rel. David Pasula v. Consolidation Coal Comp 2 FMSHRC 2786 (1980) rev'd on other grounds, sub nom, Consolidation Coal Company v. Secretary, 633 F 2d. 1211 (3rd Cir., 1981). In this case, Mr. Buda asserts that he was not recalled to work in accordance with his seniority with the company. More particularly, two men with less

ne, it is clearly not sufficient to create a claim under
ction 105(c)(1) of the Act. That section does not provide
remedy for what the Complainant perceives to be "dis-
mination" if that conduct on the part of the Company
s not caused in any part by an activity protected by the Act.
cordingly I find that the Complaint herein fails to state
claim for which relief can be granted under section 105(c)(1)
the Act, and the case is therefore dismissed.

Roy J. Maurer
Administrative Law Judge

stribution:

. William J. Buda, Route 1, Box 171, Reedsville, WV 26547
ertified Mail)

. Lloyd E. Hovatter, President, DeCondor Coal Co. Inc.,
ute 1, Box 8AA, Masontown, WV 26542 (Certified Mail)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF BILLY DALE WISE, and LEO E. CONNER, Complainants,	:	DISCRIMINATION PROCEEDINGS
	:	Docket No. WEVA 85-148-D
	:	MSHA Case No. MORG CD 84-1
	:	
	:	Docket No. WEVA 85-149-D
	:	MSHA Case No. MORG CD 84-1
v.	:	
	:	Ireland Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

APPEARANCES: Covette Rooney, Esq., and Linda M. Henry, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for Complainants;
Karl T. Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent

Before: Judge Melick

These consolidated proceedings are before me upon the complaints of discrimination by the Secretary of Labor on behalf of Billy Dale Wise and Leo E. Conner under the provisions of section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 810 et seq., the "Act." The individual Complainants allege that they suffered discrimination when the Consolidation Coal Company (Consol) failed to pay them overtime for a 30 minute "lunch period" during the time they participated as section 103(f) representatives of miners with inspectors for the Federal Mine Safety and Health Administration (MSHA).[1] Motions to dismiss filed by Consol on the grounds that the complaints had been untimely

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[1]Section 103(f) of the Act provides in part that "a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine . . . for the purpose of

The essential facts in these cases are not in dispute. The individual Complainants, Billy Wise and Leo Conner, were hourly employees at Consol's Ireland Mine regularly employed as a "Longwall Shear Operator" and as a "Longwall Mechanic", respectively. Both jobs were classified at grade 5 and paid $14.165 an hour in accordance with the National Bituminous Coal Wage Agreement of 1981 (Wage Agreement).

On Monday, July 16, 1984, Mr. Wise participated as a section 103(f) representative of miners in a close-out conference with an MSHA inspector for 5-1/2 hours. At the completion of this conference Mr. Wise chose not to return to work for Consol (though such work was available) but elected to go on "union business" for the remaining 2-1/2 hours of his shift. While on "union business" the individual is not under the direction or control of the mine operator and, in accordance with the Wage Agreement, is not paid by the operator for such business.

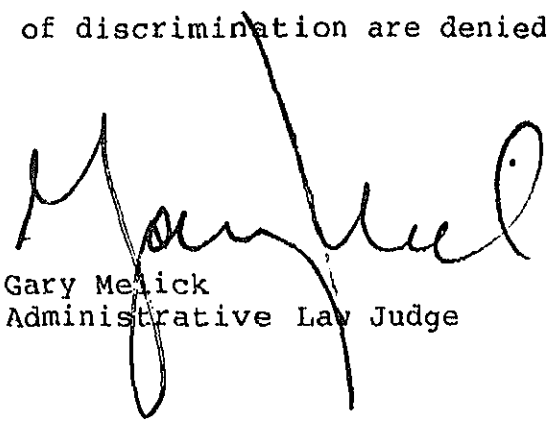
On Thursday, July 19, 1984, Mr. Conner similarly participated as a section 103(f) representative of miners during an inspection with an MSHA inspector for 5-1/2 hours. At the completion of this inspection Mr. Conner similarly chose not to return to work but "went home" for the remaining 2-1/2 hours of his shift.

The Complainants herein were paid for the 5-1/2 hours during which they acted as representatives of miners but claim that they are also entitled to an additional $10.62 corresponding to the overtime pay given to those employees who, during a particular shift, work through their 30 minute lunch period. They claim that the failure of Consol to pay this amount constitutes an unlawful loss of pay under section 103(f) of the Act and accordingly claim that this was discriminatory under section 105(c)(1) of the Act.

Section 103(f) provides in part that: "such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection." The specific issue before me then is whether the Complainants suffered a loss of pay during the stated periods of their participation as representatives of miners.

Moreover, since the Complainants chose not to return work to complete their shifts it cannot be said that they were deprived of either their lunch period or the alternati overtime pay for work through their lunch period. The Complainants therefore cannot prove that they suffered any loss of pay during the period of their participation as section 103(f) representatives of miners even if they chose not to take their 30 minute lunch period during that time.

Accordingly, the charges of discrimination are denied and the cases dismissed.



Gary Melick
Administrative Law Judge

Distribution:

Covette Rooney, Esq., and Linda M. Henry, Esq., Office of t Solicitor, U.S. Department of Labor, 14480 Gateway Building 3535 Market Street, Philadelphia, PA 19104 (Certified Mai

Karl Skrypak, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

rbg

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF BILLY DALE WISE, and LEO E. CONNER, Complainants	:	DISCRIMINATION PROCEEDINGS Docket No. WEVA 85-148-D MSHA Case No. MORG CD 84-16 Docket No. WEVA 85-149-D MSHA Case No. MORG CD 84-19
v.	:	
	:	Ireland Mine
CONSOLIDATION COAL COMPANY, Respondent	:	
	:	DISCRIMINATION PROCEEDINGS
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMININSTRATION (MSHA), ON BEHALF OF RICHARD N. TRUEX, Complainant	:	Docket No. WEVA 85-151-D MSHA Case No. MORG CD 85-2 McElroy Mine
v.	:	
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION DENYING MOTION TO DISMISS

APPEARANCES: Covette Rooney, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for Complainants; Karl T. Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Melick

These proceedings are before me upon Motions to Dismiss filed by the Consolidation Coal Company (Consol) in which it is alleged that the complaints in these cases were filed untimely with this Commission. Preliminary hearings were held in accordance with Rule 12(d) of the Federal Rules or Civil Procedure upon the request by Consol for disposition of the motions before trial on the merits. At hearing Consol

filed a timely complaint of discrimination with the Secretar of Labor on July 30, 1984, based upon his allegation of a discriminatory loss of pay on July 16, 1984. The Secretary did not however file his complaint with this Commission on behalf of Mr. Wise until March 26, 1985, nearly 8 months later. The Secretary informed Mr. Wise of that filing by letter dated April 24, 1985.

The Secretary acknowledges that he did not file the complaint in a timely manner but sets forth circumstances to explain that untimeliness. Counsel for the Secretary proffered without contradiction that the Philadelphia Regional Solicitor's Office (which represents the Secretary in this matter) did not receive the case file from the Mine Safety and Health Administration (MSHA) for its legal determinatio until September 28, 1984. Inasmuch as the case purportedly involved an issue of "first impression" the Regional Solicitor requested an opinion from the National Solicitor's Office on November 28, 1984. That opinion, to proceed with the case before this Commission, was issued on December 10, 1984 and was received by the Regional Solicitor's Office on December 20, 1984.

The designated trial attorney in the Regional Solicitor's Office thereafter, on December 26, 1984, forwarded th case file to the Office of Assessments within the Department of Labor for a civil penalty evaluation needed to comply wit Commission Rule 42(b), 29 C.F.R. § 2700.42(b). The requeste evaluation was returned from the Office of Assessments to th Philadelphia Solicitor's Office on March 15, 1985 and the complaint at bar was filed with this Commission on March 26, 1985. There was an admitted breakdown in procedures within the Department of Labor in failing to give written notice to Mr. Wise upon the Secretary's final determination (on December 10, 1984) that discrimination had occurred.

DOCKET NO. WEVA 85-149-D

The individual Complainant in this case, Leo E. Conner, filed a timely complaint of discrimination with the Secretary of Labor on August 16, 1984, based upon his allegation of a discriminatory loss of pay on July 19, 1984. The

the complaint in a timely manner and sets forth similar circumstances to explain that untimeliness. Counsel for the Secretary proferred that the Philadelphia Solicitor's Office did not receive the case file from the MSHA for its legal determination until September 25, 1984. Since this also purportedly involved an issue of "first impression" the Regional Solicitor requested an opinion from the National Solicitor's Office on November 28, 1984. A response was obtained from that office on December 20, 1984 in which final authorization was received to proceed with the case before this Commission.

The designated trial attorney in the Philadelphia Solicitor's Office thereafter, on December 26, 1984, forwarded the case file to the Office of Assessments within the Department of Labor for a civil penalty evaluation needed to comply with Commission Rule 42(b). The file was returned from the Office of Assessments to the Philadelphia Solicitor's Office on March 15, 1985 and the complaint at bar was filed with this Commission on March 28, 1985. There was again an admitted breakdown in procedures within the Department of Labor in failing to notify Mr. Conner by letter upon the final determination by the Secretary's representative (on December 10, 1984) that discrimination had occurred.

DOCKET NO. WEVA 85-151-D

The individual Complainant in this case, Richard Truex, filed a timely complaint of discrimination with the Secretary of Labor on October 10, 1984, based upon his allegation of a discriminatory loss of pay on August 28, 1984. The Secretary did not however file his complaint on behalf of Mr. Truex with this Commission until April 2, 1985, nearly 6 months later. The Secretary informed Mr. Truex of that filing by letter dated April 11, 1985.

The Secretary again acknowledges that he did not file the complaint in a timely manner and sets forth similar circumstances to explain that untimeliness. Counsel for the Secretary proferred that the Philadelphia Solicitor's Office did not receive the case file from MSHA for its legal determination until December 20, 1984. That office decided on

for a civil penalty evaluation needed to comply with Commission Rule 42(b). The file was returned from the Office of Assessments to the Philadelphia Solicitor's Office on March 18, 1985 and the complaint at bar was filed with this Commission on April 2, 1985. There was again an admitted breakdown in procedures within the Department of Labor in failing to notify Mr. Truex by letter upon the final determination by the Secretary (on January 8, 1985) that discrimination had occurred.

Analysis

Consol argues that the Secretary's delays in filing these complaints with this Commission violates the provisions of section 105(c) of the Act. Section 105(c)(3) provides in part that "within 90 days of the receipt of a complaint filed [under section 105(c)(2)] the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred." Section 105(c)(2) provides that upon the Secretary's determination that section 105(c) has been violated "he shall immediately file a complaint with the Commission, with service upon the alleged violator, and the miner, applicant for employment, or representative of miners alleging such discrimination [emphasis added]." Consol also alleges that these filing delays were in violation of Commission Rule 41(a), 29 C.F.R. § 2700.41(a), which requires that a complaint of discrimination "shall be filed by the Secretary within 30 days after his written determination that a violation has occurred." Consol concedes that it did not suffer any legal prejudice as a result of the cited delays but nevertheless asserts that the cases should be dismissed for untimely filing.

The Secretary admits the filing delays but suggests that these delays were attributable to the heavy caseload in his office and a manpower shortage. He also claims that some of the delays were attributable to the procedures now required by amended Commission Rule 42, 29 C.F.R. §2700.42. Commission Rule 42 as amended on February 2, 1984 requires the Secretary to include in his complaint filed with the Commission a specific proposed civil penalty and the reasons in support thereof. The Secretary represents that he is now studying various methods for shortening his procedures for

> within 15 days of receipt of the complaint, and immediately file a complaint with the Commission, if he determines that a violation has occurred. The Secretary is also required under [section 105(c)(3)] to notify the complainant within 90 days whether a violation has occurred. It should be emphasized, however, that these time frames are not intended to be jurisdictional. The failure to meet any of them should not result in a dismissal of the discrimination proceeding; the complainant should not be prejudiced because of the failure of the Government to meet its time obligations."

S. Rep. No. 181, 95th Cong., 1st Session 36 (1977), reprin in 1977 U.S. Code Cong. & Ad. News, at 3436.

Within this framework I am compelled to find that th Secretary's delays in filing these complaints do not warra dismissal of these cases. I do not find any evidence that the delays were caused by bad faith and it appears that th Secretary's tardiness was caused in part by his limited st and heavy caseload. In addition it would be totally inappropriate to prejudice the individual complainants in thes cases (who have not caused the delays) because of the Secr tary's tardiness. Finally, since Consol concedes herein t it did not suffer any legal prejudice by the delays those delays are accordingly harmless.[1] Under the circumstances the motions to dismiss (and/or motions for summary decisio are denied.

Gary Melick
Administrative Law Judge

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[1]No request has been made for sanctions solely against the Secretary for his acknowledged tardiness. However conside tion could be given in any civil penalty assessment for an additional costs to Consol attributable to the delays.

Esq., Office of the Solicitor, U. S. Department of
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lphia, PA 19104 (Certified Mail)

rypak, Esq., Consolidation Coal Company, 1800
ton Road, Pittsburgh, PA 15241 (Certified Mail)

JAMES W. MACKEY, JR., Complainant	:	DISCRIMINATION PROCEEDIN
	:	Docket No. WEVA 85-84-D
v.	:	MSHA Case No. MORG CD 85
CONSOLIDATION COAL COMPANY, Respondent	:	Ireland Mine
JEFFREY L. CLEGG, Complainant	:	DISCRIMINATION PROCEEDIN
	:	Docket No. WEVA 85-86-D
v.	:	MSHA Case No. MORG CD 85
CONSOLIDATION COAL COMPANY, Respondent	:	Ireland Mine

DECISION

Appearances: Thomas Myers, Esq., Shadyside, Ohio, for Complainants; Brann Altmeyer, Esq., Wheelin West Virginia, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Each of the Complainants filed a complaint with the Commission alleging that he was discharged by Respondent violation of section 105(c) of the Federal Mine Safety an Health Act of 1977 (the Act). Respondent filed answers a motions to dismiss on the ground that the Respondent was served with copies of the complaints. The motions were denied. On motion of Respondent, the two cases were consolidated by order issued April 4, 1985, because they grew out of the same facts, and involved the same witness and the same legal issues. Pursuant to notice, the case heard in Wheeling, West Virginia on April 22 and 23, 1985 James W. Mackey, Sr., James W. Mackey, Jr., Jeffrey L. Clegg, Gerald L. Stevens and Paul Haines testified on beh of complainants; Glen Curfmon, Richard W. Fleming, John H

At the commencement of the hearing, Respondent moved to dismiss on the ground that neither of the complaints stated a cause of action under section 105(c) of the Act. For the purposes of my ruling on the motions, the parties agreed that complainants are alleging that they were discharged in retaliation for a disagreement between Federal Inspector James Mackey, Sr., father of one of the complainants, and Respondent's management, over a proposed noise reduction program. The issue therefore is whether a miner is protected under 105(c) from retaliation by a mine operator because a Federal Inspector was carrying out his duties. Respondent argues that the miners here were not engaged in any "protected activity," nor were they exercising any "statutory right afforded by the Act." But surely one of the most basic rights a miner has under the Act is the right to have federal mine inspectors conduct their inspections free from any threat or fear of retaliation or coercion. This is a case of first impression, and the unique facts alleged are unlikely to be duplicated in other cases: a mine operator attempts to show his displeasure over the official actions of an inspector by discharging the inspector's son, a miner at the subject facility. I conclude that this states a cause of action under section 105(c), which protects the rights of miners to have federal inspections free from fear or concern that the mine operator may retaliate against miners for actions of inspectors. The motion to dismiss is DENIED.

FINDINGS OF FACT

1. On October 1, 1984, and prior thereto, Respondent was the owner and operator of an underground coal mine in Marshall County, West Virginia, known as the Ireland Mine.

2. On October 1, 1984, and prior thereto complainants James W. Mackey, Jr. and Jeffrey L. Clegg were employed as miners at the Ireland Mine.

3. On July 31, 1984, and prior and subsequent thereto, James W. Mackey, Sr. was employed by the Mine Safety and Health Administration (MSHA) as a Federal Mine Inspector. He is the father of complainant James W. Mackey, Jr. During the year 1984, Mr. Mackey, Sr. was assigned to perform a health inspection, including a consideration of a noise

on top of the longwall to reduce the noise to 90 decib
less. The plan further stated that if the mine noise
barrier became damaged, or if the coal height was so l
that it could not be used, it would be removed.

6. Inspector Mackey told Mr. Snyder that he coul
recommend approval of the plan unless it stipulated th
longwall operator stay 3 or 4 "chocks" above the longw
plow when cutting. This would keep the noise level do
about 90 decibels even if the barrier was damaged or
destroyed.

7. Snyder objected to the suggested revision and
"Well, I spent $6000 dollars and six months work, wor
on that . . . . I am not going to do it." (Tr. 23) T
inspector believed that Snyder was very upset.

8. Inspector Mackey recommended that the Plan be
disapproved, and it was disapproved by the MSHA Distri
Manager.

9. A new plan was proposed reflecting the change
suggested by Inspector Mackey. This plan was presente
Inspector Mackey by Respondent's General Superintenden
Becker. Snyder was not present at the meeting. The p
was approved, and has remained in effect at the mine.

10. On October 1, 1984, James W. Mackey, Jr. was
employed at the mine as a bolter helper, on the midnigh
shift. He had worked at the Ireland Mine for 16 years
months. He was a member of Local 1110, United Mine Wo
of America.

11. On October 1, 1984, Jeffrey L. Clegg was empl
at the mine as a roof bolter, on the midnight shift.
worked for Respondent 14 years and 8 months. He was a
member of Local 1110, United Mine Workers of America.
was a certified electrician, and had worked for Respon
as a mechanic before he was laid off. He was called b
an unskilled laborer some time prior to October 1, 198

12. On October 1, 1984, Mackey and Clegg worked u
section foreman Glenn Curfmon and were assigned to sho
walkway, build a crib in front of the No. 2 air shaft,

of the mine on other duties.

13. Mackey and Clegg split up at about 2:55 a.m., Mackey to do pumping in the 1 South area, and Clegg to do pumping in the dump area.

14. The area where Mackey proceeded on foot was substantially flooded. He set and primed the pumps while standing in water to his knees. He was not wearing rubber boots and his trousers became very wet. After he pumped out the area, he proceeded toward the portal at about 5:30 a.m. and met Clegg who was on the jeep at the pumphouse.

15. Clegg had gone to the Dump area and had substantial difficulty in priming the pump there. After priming it, he proceeded to two other pumps, got them pumping, checked some others, and proceeded to the portal switch. At about 5:55 he called the dispatcher and told hm he was "in the clear" at the portal switch. He met Mackey and they checked the pumps in the portal area. They decided to wait for Curfmon there because they heard on the jeep radio that he was going to the head of 3 North on his fire boss run.

16. Mackey sat in the portal bus which had a heater in an attempt to dry his clothes. Clegg sat in the jeep, and ate a sandwich and drank coffee.

17. Richard Fleming was the day shift foreman at the River Portal of the subject mine on October 1, 1984. He had held that portion for almost nine years. He arrived at the mine on October 1, 1984 at about 5:00 a.m. in order to make a preshift examination in the 2 South Seals area where his crew was expected to work that morning.

18. Fleming entered the mine and arrived at the top of the supply slope at 5:35 a.m. He preshifted the area along the slope as he proceeded toward 2 South Seals. He decided to get a jeep and walked to the portal switch. At about 6:07 a.m. he arrived at the area where Mackey and Clegg were in the parked vehicles.

19. As he approached the jeep, Fleming said he heard the occupant snoring. He found Clegg lying on the jeep with his feet crossed. He tapped the bottom of Clegg's foot, but

DISCUSSION

Both Mackey and Clegg denied that they were sleeping. Both assert that they saw Fleming approaching their vehicles shortly after 6:00 a.m. and that Fleming was startled when Clegg spoke to him. Complainants also argue that it would not have been possible for them to be sleeping when Fleming arrived, since Clegg was seen by Foreman Curfmon at 5:39 a.m. and called the dispatcher at about 5:55 a.m. Were the complainants sleeping at work? An answer to this question depends in large part on an assessment of the witnesses' credibility. The testimony of Mackey and Clegg was not inherently incredible, but they have an obvious motive to deny that they were sleeping. I reject the argument that it would have been impossible, given the time factor, for Clegg and Mackey to have been asleep when Fleming came upon them. Between 5 and 10 minutes elapsed between the time complainants completed their pumping duties and sat in the vehicles, and the time that Fleming came upon them. In view of the clear and detailed testimony of Fleming, I conclude that he could not have been mistaken, nor could his testimony be explained by the fact that his senses were dulled by medication. The only remaining explanations for his testimony are (1) complainants were asleep as he testified, or, (2) Fleming was lying. No reasonable motive has been suggested for Fleming to have fabricated his testimony. The testimony of Paul Haines on rebuttal that Fleming told him in a conversation following the arbitration hearing that "he [Fleming] never caught Jim Mackey sleeping. He said that he went up and he said something to Clegg and Clegg yelled real loud at Jim and Jim Mackey came scurrying out of the portal bus in front of them" (Tr. 574), reflects on the credibility of Fleming's testimony to some extent, but I am convinced that he was basically telling the truth. I conclude on the basis of all the testimony that in fact Fleming saw both Clegg and Mackey asleep in or on the vehicles at about 6:05 a.m. October 1, 1984.

20. Fleming told Mackey and Clegg that they were relieved of their duties for sleeping on company time. He led them from the mine at 6:18 a.m. and told them they would have to report to the superintendent before returning to work.

Each of the complainants a letter notifying them that they were relieved of their duties and that the company intended to discharge them.

22. Complainants filed grievances under the collective bargaining contract. The grievances went to arbitration and the arbitrator denied the grievances and upheld the discharges in a written decision issued October 23, 1984.

23. Fleming was not aware of the dispute between Snyder and Inspector Mackey at the time he relieved complainants of their duties for sleeping.

24. A notice was posted on the mine Bulletin Board on January 7, 1980, following an arbitrator's decision regarding company rules. The notice reads as follows:

> Employees are hereby placed on notice that neglect in performance of assigned duties or sleeping on company time are dischargeable offenses. Any employee found neglecting to perform assigned duties or sleeping on company time will be subject to suspension with intent to discharge.

25. There had been incidents prior to the posting of the above notice in which Respondent's employees were charged with sleeping on company time and were not discharged.

26. Clegg and Mackey had generally good work records prior to the October 1, 1984 incident.

ISSUE

Whether complainants were discharged in violation of rights protected under the Act?

CONCLUSIONS OF LAW

I. Complainants and Respondent are protected by and subject to the provisions of the Act, complainants as miners, and Respondent as the operator of the Ireland Mine

dismiss, that Complainants are protected under the Act retaliation against them for actions of Federal Mine Inspectors in carrying out their inspection duties.

III. ADVERSE ACTION - RESPONDENT'S MOTIVATION

Complainants were discharged ostensibly for sleep the mine during working hours. They claim that the discharge was in fact related to the disagreement betw Respondent's Superintendent and an MSHA Inspector, who happened to be the father of one of the claimants. If adverse action was motivated in any party by the prote activity, a prima facie case of discrimination is made Secretary/Pasula v. Consolidation Coal Co., 2 FMSHRC 2 (1980), rev'd on other grounds sub. nom. Consolidation Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHR (1981). Here, there is no direct evidence that Respon discharge of complainants was motivated in any part by disagreement between Superintendent Snyder and Inspect Mackey. The two incidents are relatively remote in ti (more than 2 months apart), and the alleged motivation to me inherently unlikely under the circumstances disc in this record. I accept the testimony of Mr. Fleming he was completely unaware of the dispute between Snyde Mackey, Sr. which took place two months previously, wh took complainants from the mine and accused them of sl on company time. Although the actual decision to disc was made by Snyder, it was based on Fleming's statemen conclude that complainants have failed to establish th their discharges were motivated in any part by the act protected under the Act. Therefore, they have failed establish a prima facie case of discrimination under s 105(c).

IV. UNPROTECTED ACTIVITY

An operator may rebut a prima facie case of discrimination if it proves that (1) it was also motiv by the miner's unprotected activities, and (2) it woul taken the adverse action for the unprotected activitie alone. The operator bears the burden of proof with re to these matters which are affirmative defenses. See Transportation Management Corp., 76 L. Ed. 2d 667 (198

the entire record that Complainants have failed to estab
that they were discharged in violation of section 105(c)
the Act.

ORDER

Based upon the above findings of fact and conclusio
of law, the complaints of James W. Mackey, Jr. and of
Jeffrey L. Clegg and this proceeding are DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

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v.	:	Order No. 2252764; 4/9/8
	:	
SECRETARY OF LABOR,	:	Urling No. 3 Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	

ORDER OF DISMISSAL

Appearances: William M. Darr, Esq., Indiana, Pennsylvania for Contestant; James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Broderick

When the above case was called for hearing in Indiana, Pennsylvania, on June 4, 1985, Contestant moved to withdraw its notice of contest in this proceeding. The parties agre on the record to a settlement of the civil penalty proceedi insofar as a penalty was sought for the violation charged i the contested order, by the payment of the amount originall assessed. I stated on the record that I approved the settl and granted the motion to withdraw.

Therefore, IT IS ORDERED that this proceeding is DISMISSED.

James A. Broderick
Administrative Law Judge

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slk